

# **“TOPICAL” INDEX & SELECTED SUMMARIES**

## **of**

## **ADVISORY OPINIONS**

**Updated June 16, 2005**

### **Advocacy Groups**

AO 98-019 (Environmental Management Commission – reception and dinner given by industry association)  
AO 98-021 (neither Order nor statute prohibits organization [CCA] members from serving on public body)  
AO 99-014 (Coastal Resources Commission)  
AO 00-006 (Marine Fisheries Commission)  
AO 00-007 (Environmental Management Commission)  
AO 02-003 (NC Medical Board: comparable situation -- involvement with PAC; general rules)  
AO 03-001 (contract employment with environmental advocacy organization)  
AO 03-002 (Public Official’s membership in related trade association)

**AO-03-002 (January 8, 2004):** A Public Official inquired about the permissible degree of involvement between covered Officials and related trade associations. Regarding *disclosure* of trade association membership on Statement of Economic Interest (“SEI”) forms, the Board concluded that members should reveal their trade association membership in this situation, particularly if they were “honorary” members in the organization. A close association with an organization or group raises conflict and appearance of conflict issues which must be examined on a case-by-case basis. However, because of the ambiguity of the SEI form in this context and statements about “mere membership” in earlier advisory opinions, the Board did not feel that a member’s failure to disclose NCAPI membership on earlier SEI forms was an “ethical violation.”

The Board reiterated that it is *not* an impermissible conflict of interest for a Public Official to merely *serve* on a non-public body as well as a covered public board; the governors’ ethics orders do *not* prohibit participation in other professional activities. In many cases, it is expected or even required. Membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a potential conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, “the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.” Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles.

Furthermore, the Board reiterated that there are different conflict of interest/disqualification standards in different situations. A higher standard of disqualification is applied in quasi-judicial proceedings (like individual licensing decisions or disciplinary actions) than quasi-legislative matters (like most rulemaking). Unless there is some personal or other connection between the Public Official and another trade association member, the Public Official may generally participate in both contested cases (quasi-judicial decisions) and rulemaking (quasi-legislative) proceedings involving a fellow association member. The Public Official should *not* participate in matters involving association members with whom he/she has had personal involvement, worked on a specific project, or has a significant personal or professional relationship. Nor should a Public Official be involved in any matter where he/she has a specific, unique, and substantial interest in the outcome. If the trade association itself is a party to a proceeding before the public body, the relevant inquiry is the Public Official’s connection to or degree of association with *the association*. If a “mere” member, the Public Official does not have a “personal relationship” with the association and may

generally participate in both quasi-legislative and quasi-judicial proceedings. If serving in a leadership or policy-making position in the trade association (for example as an officer or director), the Public Official should not participate in either a contested case (quasi-judicial proceeding) involving the association or a rulemaking proceeding (quasi-legislative proceeding) where the association is the petitioner. He or she may generally participate in rulemaking proceedings where either the association or a member merely comments on a proposed rule.

The Board concluded that it is not *per se* improper for a Public Official to be an active, associate, or honorary member of a trade association. Nor would membership on an association's governing body be prohibited. The degree of association or involvement with the association would directly impact the degree to which the member could be involved in proceedings involving the association and its members. "Mere" membership would not normally constitute the type of "personal relationship" contemplated by section 7 (b) (2) of the Order; a leadership or policy-making position would. An "honorary" membership was deemed to fall somewhere in the middle and would need to be addressed on a case-by-case basis.

**AO-03-001 (July 18, 2003):** [NOTE: this opinion modified AO-00-007-B (October 9, 2000) and should be read in conjunction therewith.] A member of the Environmental Management Commission ("EMC" or "the Commission") inquired whether given his recent change from full-time employment with an environmental advocacy organization to that of an independent contractor on a project-by-project basis, with a corresponding change in employment responsibilities, did the standards and restrictions of previous advisory opinions still apply? The Board found that some had changed. Mr. Besse's employment relationship with CCNC changed from that of Conservation Political Director-employee to an independent contractor. He now provides contract services on a project-by-project basis. His initial contract involves writing and editing a weekly bulletin on state legislative and political environmental news. He will not regularly attend or participate in CCNC board meetings. Moreover, his present contract does *not* involve the solicitation of contributions from CCNC members, and Mr. Besse does not anticipate performing that type of service in the future.

In AO-00-007-B, the Board of Ethics established the general parameters for when Mr. Besse should be allowed to participate in (a) contested cases or (b) rulemaking proceedings involving (i) his employer (CCNC) or (ii) its members, given his financial and/or "personal" relationship with each. This significant opinion was extremely fact-driven. Indeed, the Board determined that despite a significant personal and financial relationship, Mr. Besse should generally be allowed to participate in rulemaking proceedings when either CCNC or its members merely **comment** on proposed rules. Likewise, on the other end of the spectrum, Mr. Besse should not participate in either a contested case involving his contract employer, CCNC, or in a rulemaking proceeding when CCNC is the petitioner.

The most difficult question involves Mr. Besse's possible participation when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding. In AO-00-007-B, the Board found that Mr. Besse should *not* participate when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding "[b]ecause of the significant relationship, both financial and otherwise, between Mr. Besse, CCNC, and CCNC's members." The Board made it clear that it was dealing with "a significant, and perhaps even extreme, financial interest" in the original Besse situation. That situation appears to have changed. Consequently, based on the facts of this case, the Board determined that Mr. Besse should *generally* be allowed to participate in both contested cases and rulemaking proceedings when a *mere* CCNC member is a participant. There are many caveats, however, and Mr. Besse was advised to exercise extreme caution to avoid real or apparent conflicts in particular cases.

**AO-00-007-B (October 9, 2000):** [NOTE: this opinion was modified by AO-03-001 (July 18, 2003) and should be read in conjunction therewith.] Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide

education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members, which sometimes provides public comments on relevant State administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). The Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules. See also AO 03-001 (contract employment with environmental advocacy organization)

**AO-00-006 (July 13, 2000):** A member of the Marine Fisheries Commission asked about conflict of interest rules in general and the application of those rules to his particular situation given his membership on the board of directors of an advocacy group that proposed quasi-legislative action (presumably in the form of rulemaking) by the public body on which he served. Relying on an earlier opinion, the Board of Ethics found that in quasi-legislative situations such as this, Public Officials “should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding.” A “personal relationship” includes one in a policy-making position in an organization or group. A “participant” includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking. So, as a board member of an advocacy group actively petitioning the Commission to take quasi-legislative action, the member was advised that he should **not** participate in the Commission’s decision regarding such proposed action.

As a general matter, Public Officials are not automatically disqualified from participating in agency/board decisions simply because of their involvement, financial or otherwise, in the industry or area being regulated. In fact, such industry or organization involvement is often legislatively mandated, as it is for the MFC. When statutes require that interested persons be appointed to regulatory or licensing boards, the Board of Ethics generally does not find that such persons have an impermissible conflict of interest due to their personal or financial interest. The Board of Ethics does, however, find that these appointees have the **potential** for conflict of interest and must recuse themselves from discussing or voting on matters before the Board that will specifically impact or affect their business, license, or special interest group with which they are significantly involved. Nor will it affect the board member’s ability to participate in general regulatory decisions that will affect the industry as a whole. The degree of allowable participation, if any, must be determined on a case-by-case basis and varies depending upon the particular function being performed by the public body (e.g., quasi-legislative vs. quasi-judicial).

**AO-99-014 (July 7, 1999):** Most Coastal Resources Commission members are required to have certain backgrounds or fields of expertise, including one member “who at the time of appointment [is] actively associated with a State or national conservation organization.” Two CRC members were members of conservation and/or environmental advocacy groups that appear regularly before the CRC. The Board noted that an appearance of conflict exists when a reasonable person would conclude from the circumstances that the Public Official’s ability to protect the public interest, or perform public duties, is compromised by personal interests. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite “personal relationship.” A “participant” in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking.

The Board concluded that CRC members may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on

whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the petitioner for a rule. The fact that the member's advocacy group has merely commented on a rule does not, in and of itself, disqualify the member from participation.

In **quasi-judicial proceedings**, legal impartiality is required, and the member must avoid both conflict of interest and bias. Consequently, members in policy-making positions (like board members) of advocacy groups may not participate in contested cases involving their advocacy group or where their impartiality might reasonably be questioned as a result of their association with such group.

The fact that a CRC member occupies the seat required to be filled by someone actively associated with a State or national conservation organization does not make a difference in either quasi-judicial or quasi-legislative situations. Moreover, the fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of conflict of interest issues for members of the group who serve on State boards and commissions. The same guidelines discussed above would apply.

**AO-98-019 (November 9, 1998):** Public Officials (members of the Environmental Management Commission) should not attend a reception and dinner given in “their honor” by a major business and industry organization which regularly participates in EMC rulemaking by submitting comments on proposed rules and regulations and whose members (but not the organization itself) are regulated by the EMC. To do so could present an appearance of conflict of interest.

## **Bias, in general**

AO 91-002 (perception of bias because of service on Board of Trustees of private institution)  
AO 93-002 (bias due to former employer-employee relationship; industry members of licensing boards)  
AO 98-005 (employment by non-profit research organization hired to analyze data for public body)  
AO 98-010 (bias from current or former association with entities requesting grants from public body)  
AO 98-014 (past service/association with entity)  
AO 98-021 (Marine Fisheries Comm. – bias due to membership in outside organization)  
AO 99-014 (CRC opinion – “bias” as a general preference and “legal bias”; major decision on bias)  
AO 99-018 (bias due to employment by private non-profit that appears before public body)  
AO 00-007 (EMC – bias due to employment by advocacy organization & dealings with its members)  
AO 00-008 (EMC – bias from prior association with party & “legal bias”)  
AO 02-001 (Real Estate Commission – generalized “bias” ok in quasi-legislative decision-making)  
AO 02-003 (NC Medical Board -- involvement with PAC; general rules; brief mention of bias)  
AO 04-001 (intentionally built into many public bodies; allowable bias varies with type of decision-making)

**AO-04-001C (July 8, 2004)** (compliments AO-04-001B): The Chairman of the Commission for Health Services (“CHS” or “the Commission”) requested an advisory opinion on various conflict of interest/appearance of conflict questions related to a Commission member’s private consulting work for a company petitioning the Commission for approval of its wastewater system. The General Assembly has decided that relevant experience and knowledge count as much or more than trying to have a theoretically “bias”-free decision-making body. Covered boards and commissions are not intended to be like juries. The Board noted long ago and has repeated many times since that “bias” in the sense of a general preference or inclination is intentionally built into many a public body. But the allowable degree of bias varies with the

type of public decision-making being done (quasi-legislative vs. quasi-judicial). There is a line that cannot be crossed in either context. Sometimes it is difficult to see that line, and its location varies in different situations. The best the Board can do is decide each case on its individual merits, and that is how this opinion should be viewed.

**AO-00-008 (September 11, 2000):** The Public Official/former mayor of a municipality involved in a contested case proceeding before the Official's public body (EMC) inquired whether he had an impermissible conflict of interest or appearance of conflict due to his prior association with the municipal party. The Official had been the mayor for 10 years, but had not represented or been officially connected with the municipality for nearly 19 years. The City is now a party to a contested case pending before the EMC. Because the proposed action here is quasi-judicial in nature (making a final decision in a contested case), legal impartiality is required, and the member must avoid both conflicts of interest and bias. What constitutes **legal bias** is a question of law for the Commission and its counsel. However, as pointed out in the CRC opinion, North Carolina courts have found that legal bias may include (1) preconceptions about facts, policy, law, a person, a group, or an object, (2) a personal interest in the outcome of some determination, (3) a fixed opinion that is not susceptible to change, (4) an undisclosed ex parte communication, or (5) a close familial or business relationship with an applicant.

In addition, the "personal interests" that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. This could include, under appropriate circumstances, a **former** association or relationship with a participant in a covered proceeding. Determining factors would include the nature of the former association or relationship, the length of time separating it from the current public position or function, and the type of proceeding being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative). In this case, the extreme gap of time was sufficient to eliminate a reasonable perception of impermissible bias. [See also AO-98-014 involving the same Public Official/body, but re rulemaking.]

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members. It sometimes provides public comments on relevant State administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). Unlike AO 99-014 (the CRC opinion) which dealt with an apparent "philosophical bias" due to a Public Official's policy-making position in an outside organization or group, this opinion involved a "bias" in the form of a significant, and perhaps extreme, financial interest in the form of an employer-employee relationship. There was direct involvement between the employee/Public Official and at least some of his employer's members. As a result, the Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules. The Board reiterated that what constitutes "legal bias" in the context of contested cases is a matter of law for the public body and its legal counsel. See also AO 03-001 (contract employment with environmental advocacy organization)

**AO-99-018 (September 21, 1999):** The Public Official is employed by a private non-profit community organization which makes requests (including requests for funding) of the public body on which the Official serves (the NC Human Relations Commission). The Board of Ethics stated that in order to avoid the appearance of conflict of interest, the Official should neither appear before the public body as a representative of her private employer nor participate in decisions involving her employer.

**AO-99-014 (July 7, 1999):** Appointees to State boards and commissions are often selected to “represent” the perspective of different, even opposing, interests. Thus, the potential for “bias” in the sense of a general preference or inclination is intentionally built into the organizational structure. Traditionally, this is an acceptable part of the legislative/quasi-legislative process, like most rulemaking. Courts will generally not concern themselves with the underlying motives or rationale for legislative/quasi-legislative decisions, particularly if such motivations are non-financial. Partisan interests are superseded, however, by basic considerations of fairness and due process in judicial/quasi-judicial situations, such as contested cases, where an unbiased, impartial decision-maker is deemed essential. Most Coastal Resources Commission members are required to have certain backgrounds or fields of expertise, including one member “who at the time of appointment [is] actively associated with a State or national conservation organization.” Two CRC members were members of conservation and/or environmental advocacy groups that appear regularly before the CRC.

The Board noted that an appearance of conflict exists when a reasonable person would conclude from the circumstances that the Public Official’s ability to protect the public interest, or perform public duties, is compromised by personal interests. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite “personal relationship.” A “participant” in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking.

The Board concluded that CRC members may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the petitioner for a rule. The fact that the member's advocacy group has merely commented on a rule does not, in and of itself, disqualify the member from participation.

In **quasi-judicial proceedings**, legal impartiality is required, and the member must avoid both conflict of interest and bias. According to the North Carolina Supreme Court, **legal bias** may include preconceptions about facts, policy, or law; a person, group, or object; or a personal interest in the outcome of some determination. Likewise, a fixed opinion that is not susceptible to change, an undisclosed ex parte communication, or a close familial or business relationship with an applicant may constitute impermissible bias. These determinations will need to be made on a fact-specific, case-by-case basis. Consequently, members in policy-making positions (like board members) of advocacy groups may not participate in contested cases involving their advocacy group or where their impartiality might reasonably be questioned as a result of their association with such group.

The fact that a CRC member occupies the seat required to be filled by someone actively associated with a State or national conservation organization does not make a difference in either quasi-judicial or quasi-legislative situations. Moreover, the fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of conflict of interest issues for members of the group who serve on State boards and commissions. The same guidelines discussed above would apply.

**AO-98-021 (February 3, 1999):** Someone complained that certain members of the Marine Fisheries Commission (MFC) were biased toward an outside organization of which they were members (the Coastal

Conservation Association). The Board noted that the public body's enabling statute is designed to bring a broad range of perspectives to the MFC by calling for the appointment of individuals who represent various facets of the fishing world. Accordingly, neither the statute nor the ethics order prohibits individuals affiliated with or members of organizations from serving on public bodies. However, Officials are prohibited from voting on (1) any petition submitted by an advocacy group of which he or she is a member or officer, or (2) any issue that would have a significant and predictable effect on the member's financial interests.

[But see AO-99-014 (CRC opinion) regarding mere membership in an advocacy organization: In quasi-legislative matters (like most rulemaking), the "personal interests" that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite "personal relationship." In quasi-judicial proceedings (like contested cases), legal impartiality is required, and the Official must avoid both conflict of interest and bias.]

**AO-98-014 (July 31, 1998):** The Public Official/former mayor of a municipality involved in rulemaking asked whether he had a disqualifying conflict of interest due to his prior association with the municipal party. The Official had not held a public office in the municipality for 17 years and currently holds no official position with any other governmental agency in the region. The public body (EMC), and thus the Official, is now being asked to choose between two sets of land use controls, one of which will impose greater duties on local governments, like the Official's former employer. The Board found that the passage of 17 years removed the potential for a conflict of interest based on the prior local government service. The Official was advised to disclose his prior position with the municipal participant and consider whether he was biased in its favor. [See also AO-00-008, involving the same Public Official in a contested case.]

**AO-98-010 (June 29, 1998):** Public Officials having, through elected positions or otherwise, interests in projects under consideration for grants from their public body inquired about conflicts/appearances of conflict with regard to the same. The Board of Ethics advised *active members* of a local government's board or commission which was applying for a grant from the Official's public body (the Parks and Recreation Authority) to recuse themselves from voting on the grant application from the local government they serve. To actively participate in the discussions or final decisions regarding grant applications from the Official's own local government could cause an impermissible appearance of conflict of interest in violation of the Order. The Official may, however, provide information to other members that may be helpful to the public body's evaluation of the grant proposal. *Elected officials* of local governments applying for grants would have an actual conflict of interest and cannot participate in discussion or voting on that grant application.

*Former members* of a local government's board or commission applying for a grant should disclose their past relationship with the grant applicant and discuss with fellow members any concerns of bias toward favoring that applicant over others. In cases of doubt, the presiding officer determines the extent to which, if any, the Official will be allowed to participate, according to the Order.

Finally, where the ethics order requires an Official to withdraw from participation in deciding one particular grant application because of a conflict or appearance of conflict of interest, must he or she withdraw from participation in deciding **all other** grant applications? No. If Officials were prohibited from participation on other grant applications, the public body would be rendered ineffective. The Board of Ethics' role is to provide advice on how to avoid conflicts and not to create situations where a public body cannot operate effectively. Thus, the Board recommended that the Public Officials participate unless they personally believed that they could not give an unbiased review of the other grant applications. This is a determination that any member to a public board, commission, or authority must make when serving in a position of public trust.

## Comments/Commentors in Rulemaking

AO 99-014 (advocacy group's commenting on a rule does not disqualify Official from participation)

AO 00-007 (Officials generally not barred from participation when employer/members comment on rules)

AO 03-002 (general discussion re Public Official's membership in related trade association)

**AO-03-002 (January 8, 2004):** A Public Official inquired about the permissible degree of involvement between covered Officials and related trade associations. After reviewing recent opinions, the Board reiterated that there are different conflict of interest/disqualification standards in different situations. A higher standard of disqualification is applied in quasi-judicial proceedings (like individual licensing decisions or disciplinary actions) than quasi-legislative matters (like most rulemaking). Unless there is some personal or other connection between the Public Official and another trade association member, the Public Official may generally participate in both contested cases (quasi-judicial decisions) and rulemaking (quasi-legislative) proceedings involving a fellow association member. The Public Official should *not* participate in matters involving association members with whom he/she has had personal involvement, worked on a specific project, or has a significant personal or professional relationship. Nor should a Public Official be involved in any matter where he/she has a specific, unique, and substantial interest in the outcome. If the trade association itself is a party to a proceeding before the public body, the relevant inquiry is the Public Official's connection to or degree of association with *the association*. If a "mere" member, the Public Official does not have a "personal relationship" with the association and may generally participate in both quasi-legislative and quasi-judicial proceedings. If serving in a leadership or policy-making position in the trade association (for example as an officer or director), the Public Official should not participate in either a contested case (quasi-judicial proceeding) involving the association or a rulemaking proceeding (quasi-legislative proceeding) where the association is the petitioner. He or she may generally participate in rulemaking proceedings where either the association or a member merely comments on a proposed rule.

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members. It sometimes provides public comments on relevant State administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). The Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. However, the Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules.

**AO-99-014 (July 7, 1999):** "Bias" in the sense of a general preference or inclination is intentionally built into the organizational structure of many State boards and commissions (like the CRC). Traditionally, this is an acceptable part of the legislative/quasi-legislative process, like most rulemaking. Courts will generally not concern themselves with the underlying motives or rationale for legislative/quasi-legislative decisions, particularly if such motivations are non-financial. Partisan interests are superseded, however, by basic considerations of fairness and due process in judicial/quasi-judicial situations, such as contested cases, where an unbiased, impartial decision-maker is deemed essential.

The Board concluded that CRC members may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests,



except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the *petitioner* for a rule (an organization or group which has petitioned for rulemaking is considered a “participant” in the proceeding for appearance of conflict analytical purposes). The fact that the member's advocacy group has merely *commented* on a rule does not, in and of itself, disqualify the member from participation.

The fact that a CRC member occupies the seat required to be filled by someone actively associated with a State or national conservation organization does not make a difference in either quasi-judicial or quasi-legislative situations. Moreover, the fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of conflict of interest issues for members of the group who serve on State boards and commissions.

## **Competitors/Competition**

AO 91-001 (a “reasonably foreseeable benefit” includes a detriment to business competitor)  
AO 93-002 (detriment to a competitor can be a “personal interest”/“foreseeable benefit” for conflict analysis)  
AO 99-017 (conducting paid reviews while a board member could appear to give a competitive advantage)  
AO 00-004 (an Official’s access to sensitive business information creates a significant potential for conflict)  
AO 04-001 (disqualified Official could not act on competitor’s petition)

**AO-00-004 (March 20, 2000):** A licensing/regulatory board asked about conflict/appearance of conflict issues relating to, among other things, Public Officials’ potential access or exposure to confidential trade/financial information during the review and approval process for regulated schools. The public body’s duties include establishing rules and conducting reviews for the approval of such schools. The current chairman of the subject board is an owner of such a school. As to the licensing board member/chairman’s involvement in reviewing and approving other schools given the fact that applicant schools are required to provide information about the internal operation of the school, including sensitive financial information, in their applications, the Board of Ethics was not able to provide a complete solution to the problem. The licensing board was in the best position to determine how to reconcile the competing interests of ensuring a diverse representation on the board while neither giving nor appearing to give a competitive advantage to a business owner as a result of his public position on the board. The Board of Ethics pointed out that a Public Official may not use information gained in the course of, or by reason of, his or her official responsibilities in a way that would affect a personal financial interest of the Public Official or a business with which the Official is associated. Nor can a covered Public Official improperly use confidential information. The situation whereby a sitting board member may have access to sensitive business information of competitors, particularly financial information, creates a significant *potential* for conflict and the appearance of conflict. The board member in question must exercise extreme caution in this situation.

In granting or denying a school’s license, the covered board is acting in a “quasi-judicial” capacity. Accordingly, a higher standard of “bias” and official disqualification applies. In addition, dual financial interests are involved: both that of the board member and his potential competitors. Combining these factors, the Board of Ethics determined that it would create, at a minimum, an appearance of conflict for a board member who is also a school owner to review and approve schools **if** he has to review confidential business information (including financial information) in order to do so. This does not mean, however, that school-owner board members should be shut completely out of the review process. To the extent possible, the legislative goal to include all relevant perspectives should be furthered. Again, the licensing board is in the best position to try and meet this difficult goal.

**AO-99-017 (September 20, 1999):** Conducting “program reviews” for pay while a member of the public body that ultimately passes judgment on the programs being reviewed could appear to give the Official a

competitive advantage over other reviewers. Among other things, the public body (the Board of Dietetics and Nutrition) is charged with protecting the public from being harmed by unqualified persons by providing for the licensure and regulation of practitioners. One way the public body does this is by having “certified reviewers” evaluate programs and recommend their approval or denial. Certified reviewers are paid for this service. There are only about 25 such reviewers statewide. The Board of Ethics found that the Official’s participation in the public body’s certification decisions regarding reviews conducted by other certified program reviewers while independently performing his or her own reviews could, at a minimum, create the appearance of a conflict of interest. Conducting program reviews while an active board member could appear to give the Official a competitive advantage over the other certified reviewers. It could also put the Official’s board in an awkward position vis-à-vis the handling and dissemination of potentially useful trade information (e.g., lists of current or future programs needing certification). Thus, to completely remove any appearance of conflict of interest, the Official was advised to refrain from conducting program reviews while an active board member.

**AO-93-002 (August 27, 1993):** Detriment to a business competitor or potential business competitor can be a “personal interest” or “reasonably foreseeable benefit” for conflict analysis purposes. This opinion involved an unidentified occupational licensing board. The Board of Ethics stated that Public Officials should not participate in, vote on, influence, or attempt to influence the decision to license an individual if they have a personal interest in the outcome, or a reasonably foreseeable benefit from the outcome. “Personal interest” and “reasonably foreseeable benefit from” include, without limitation, their employees or former employees or a detriment to a business competitor or potential business competitor. Thus, the members of the licensing board who are former employers of the applicant should not participate in, vote on, influence, or attempt to influence any matters pertaining to the applicant including licensure or disciplinary matters.

**AO-91-001 (August 13, 1991):** A “reasonably foreseeable benefit” includes detriment to a business competitor. The question involved the scope of allowable participation by “practical bankers” on the Banking Commission in decisions involving financial institutions that are within the primary service area of the institution of which the member is an officer. After noting that industry members on licensing and regulatory boards have the potential for conflict of interest, the Board of Ethics stated that members should not participate in, vote on, influence, or attempt to influence any official decision if the member has a pecuniary interest in the matter under consideration, or if the member can receive a reasonably foreseeable benefit from the decision. Moreover, the Board found that a “reasonably foreseeable benefit” includes detriment to a business competitor.

## **Confidential Information**

AO 99-005 (it is a conflict to have access to the confidential exams while teaching exam review courses)  
AO 99-017 (conducting paid reviews while a board member could appear to give a competitive advantage)  
AO 00-004 (an Official’s access to sensitive business information creates a significant potential for conflict)  
AO 03-002 (general discussion re Public Official’s use of info for related trade association)  
AO 04-001 (general statement about not using confidential information)  
AO 05-001 (general statements in the context of Public Officials teaching continuing education classes)

**AO-03-002 (January 8, 2004):** A Public Official inquired about the permissible degree of involvement between covered Officials and related trade associations. While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, “the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.” Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles. It is a violation of the Order for a Public Official to “use or disclose information gained in the course of, or by

reason of, his or her official responsibilities in a way that would affect a personal financial interest of ... [an] organization or group with which the Public Official is associated.” Disclosure of protected confidential information may also be a violation of applicable laws, and Public Officials should be very careful in dealing with this type of information.

**AO-00-004 (March 20, 2000):** A licensing/regulatory board asked about conflict/appearance of conflict issues relating to, among other things, Public Officials’ potential access or exposure to confidential trade/financial information during the review and approval process for regulated schools. The public body’s duties include establishing rules and conducting reviews for the approval of such schools. The current chairman of the subject board is an owner of such a school. As to the licensing board member/chairman’s involvement in reviewing and approving other schools given the fact that applicant schools are required to provide information about the internal operation of the school, including sensitive financial information, in their applications, the Board of Ethics was not able to provide a complete solution to the problem. The licensing board was in the best position to determine how to reconcile the competing interests of ensuring a diverse representation on the board while neither giving nor appearing to give a competitive advantage to a business owner as a result of his public position on the board. The Board of Ethics pointed out that a Public Official may not use information gained in the course of, or by reason of, his or her official responsibilities in a way that would affect a personal financial interest of the Public Official or a business with which the Official is associated. Nor can a covered Public Official improperly use confidential information. The situation whereby a sitting board member may have access to sensitive business information of competitors, particularly financial information, creates a significant *potential* for conflict and the appearance of conflict. The board member in question must exercise extreme caution in this situation.

In granting or denying a school’s license, the covered board is acting in a “quasi-judicial” capacity. Accordingly, a higher standard of “bias” and official disqualification applies. In addition, dual financial interests are involved: both that of the board member and his potential competitors. Combining these factors, the Board of Ethics determined that it would create, at a minimum, an appearance of conflict for a board member who is also a school owner to review and approve schools **if** he has to review confidential business information (including financial information) in order to do so. This does not mean, however, that school-owner board members should be shut completely out of the review process. To the extent possible, the legislative goal to include all relevant perspectives should be furthered. Again, the licensing board is in the best position to try and meet this difficult goal.

**AO-99-017 (September 20, 1999):** Conducting “program reviews” for pay while a member of the public body that ultimately passes judgment on the programs being reviewed could appear to give the Official a competitive advantage over other reviewers. Among other things, the public body (the Board of Dietetics and Nutrition) is charged with protecting the public from being harmed by unqualified persons by providing for the licensure and regulation of practitioners. One way the public body does this is by having “certified reviewers” evaluate programs and recommend their approval or denial. Certified reviewers are paid for this service. There are only about 25 such reviewers statewide. The Board of Ethics found that the Official’s participation in the public body’s certification decisions regarding reviews conducted by other certified program reviewers while independently performing his or her own reviews could, at a minimum, create the appearance of a conflict of interest. Conducting program reviews while an active board member could appear to give the Official a competitive advantage over the other certified reviewers. It could also put the Official’s board in an awkward position vis-à-vis the handling and dissemination of potentially useful trade information (e.g., lists of current or future programs needing certification). Thus, to completely remove any appearance of conflict of interest, the Official was advised to refrain from conducting program reviews while an active board member.

**AO-99-005 (February 15, 1999):** Having access to confidential exams while teaching exam review classes for the licensing exams in the Public Official’s field creates an impermissible conflict of interest. Members

of the Engineers & Surveyors board have access to and often review the confidential exams administered to license applicants. Some members may participate in the preparation of portions of the licensing exam. The member in question teaches exam review classes for license applicants. Noting that Public Officials may not use confidential information gained by reason of their official position in a way that would affect their personal financial interest, the Board of Ethics found that members' exposure to the confidential licensing exam may cause members of the profession and the public to question the ability of these board members to teach exam review classes in an unbiased manner and could compromise the integrity of the exam process. Therefore, to allow members to teach such classes would create a conflict of interest.

## **Conflict of Interest, Appearance**

- AO 81-002 ("revolving door" situation)
- AO 83-004 (potential opportunity to deal with Official's own projects or those in the same area)
- AO 90-004 (outside board membership can hurt public perception [cause appearance of conflict])
- AO 91-002 (perception of conflict b/c of service on Board of Trustees of private institution)
- AO 98-001 (having clients who are regulated by the Official's public body creates appearance)
- AO 98-005 (accepting or advocating Official's employer's position would create appearance)
- AO 98-010 (Parks & Recreation grants: public perception of favoring Official's local board; see AO 01-004)
- AO 98-011 (acceptance of expense-paid trip from vendor creates an appearance of impropriety)
- AO 98-015 (Official's participation in hiring process for job he later applied for)
- AO 98-026 (involvement with professional organizations can cause an appearance of conflict)
- AO 99-002 (rental of ski condo to vendor could cause appearance of conflict of interest)
- AO 99-011 (awarding contract to Official's spouse would create an appearance of conflict)
- AO 99-012 (performing outside work for company doing business with State creates appearance)
- AO 99-013 (acceptance of gift from prior grant recipient could create appearance of conflict)
- AO 99-014 (general discussion: flexible standard; "personal interests"; "personal relationship")
- AO 99-018 (appearing before public body as representative of other organization; recusal)
- AO 01-001 (appearance of conflict for Official to participate in decision that impacts his/her private interest)
- AO 01-003 (conflict/appearance of conflict due to public body co-sponsoring continuing education course)
- AO 01-004 (spouse is mayor of town applying for grant from spouse's public body)
- AO 02-002 (member/school owner's involvement in disciplinary action involving former student)
- AO 02-003 (NC Medical Board: involvement with PAC; solicitation of licensees by Board Member)
- AO 03-002 (Public Official's membership in related trade association)
- AO 05-001 (general statements in the context of Public Officials teaching continuing education classes)
- AO 05-002 (serving on a board with one's employer was an apparent and actual conflict of interest)

**AO-01-003 (March 22, 2001):** A public body's co-sponsoring of its legally-required continuing education program with trade associations whose members are licensed and regulated by the public body could create the appearance of a conflict of interest or some undue connection between the public body and the trade associations. The Mortuary Science Board ("MSB") is required by statute to offer continuing education courses to its licensees. While the primary goal is not to make a "profit," the MSB has made a relatively small amount of money on these courses in the past. Recently, one of the two relevant North Carolina trade associations approached the MSB about co-sponsoring the continuing education program. The MSB agreed after inviting the other trade association to also take part in the program. As a result, the MSB and the two trade associations have co-sponsored two such programs, splitting expenses and any resulting profits. The MSB licenses and regulates members of the two trade associations, but otherwise has no direct regulatory contact with the associations themselves.

Public Officials must make every effort to avoid even the appearance of a conflict of interest. This is a flexible, open-ended standard applicable on a case-by-case basis. An appearance of conflict exists when a reasonable person would conclude from the circumstances that the Official's ability to protect the public interest, or perform public duties, is compromised by personal interests. The "personal interests" that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. An appearance of conflict may exist even in the absence of a true conflict of interest. The danger here lies in the possible perception that because the MSB and the trade associations are "partners" in the continuing education programs, association members will enjoy some advantages or benefits that non-members do not. Others may perceive a closer connection between the public regulator and the private organization than there really is. Yet another potential appearance is that the MSB is somehow encouraging individuals to join an association. Any one of these perceptions, if reasonable, would undermine public confidence that the MSB is acting in the best interest of the public as a whole as required by Executive Order Number One. In addition, voting to share "profits" with a private organization with which a board member is closely associated could run afoul of section 7 (a) (1) of the Order.

**AO-01-001 (February 15, 2001):** At a minimum, there is a significant appearance of conflict when a Public Official participates in a decision that either impacts or could impact his or her private interest. Sensitivity is heightened where a business or financial interest is involved. The same reasoning applies where an Official intends to acquire an interest in a project under consideration.

**AO-99-014 (July 7, 1999):** Most Coastal Resources Commission members are required to have certain backgrounds or fields of expertise, including one member "who at the time of appointment [is] actively associated with a State or national conservation organization." Two CRC members were members of conservation and/or environmental advocacy groups that appear regularly before the CRC. The Board noted that an appearance of conflict exists when a reasonable person would conclude from the circumstances that the Public Official's ability to protect the public interest, or perform public duties, is compromised by personal interests. The "personal interests" that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite "personal relationship." A "participant" in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking.

The Board concluded that CRC members may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the petitioner for a rule. The fact that the member's advocacy group has merely commented on a rule does not, in and of itself, disqualify the member from participation.

In **quasi-judicial proceedings**, legal impartiality is required, and the member must avoid both conflict of interest and bias. According to the North Carolina Supreme Court, **legal bias** may include preconceptions about facts, policy, or law; a person, group, or object; or a personal interest in the outcome of some determination. Likewise, a fixed opinion that is not susceptible to change, an undisclosed ex parte communication, or a close familial or business relationship with an applicant may constitute impermissible bias. These determinations will need to be made on a fact-specific, case-by-case basis. Consequently, members in policy-making positions (like board members) of advocacy groups may not participate in

contested cases involving their advocacy group or where their impartiality might reasonably be questioned as a result of their association with such group.

The fact that a CRC member occupies the seat required to be filled by someone actively associated with a State or national conservation organization does not make a difference in either quasi-judicial or quasi-legislative situations. Moreover, the fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of conflict of interest issues for members of the group who serve on State boards and commissions. The same guidelines discussed above would apply.

## **Conflict of Interest, in General**

- AO 81-002 (appearance of conflict in “revolving door” situation)
- AO 83-004 (potential opportunity to deal with Official’s own projects or those in the same area)
- AO 88-003 (potential conflict due to spouse/child’s ownership of stock in regulated bank)
- AO 88-005 (industry members; actual vs. potential)
- AO 89-005 (University officials’ conflicts due to stockholdings and/or board positions on banks)
- AO 90-001 (potential conflict due to Official’s dual role as chair of county commission)
- AO 90-003 (industry members; matters directly affecting Official or their financial interests)
- AO 90-004 (outside board membership can hurt public perception [cause appearance of conflict])
- AO 91-001 (industry members on licensing boards have a potential conflict of interest)
- AO 91-002 (perception of conflict b/c of service on Board of Trustees of private institution)
- AO 92-002 (actual vs. potential conflicts – explanation per Interpretive Memo Number One)
- AO 98-001 (having clients who are regulated by the Official’s public body creates appearance)
- AO 98-005 (accepting or advocating Official’s employer’s position would create appearance)
- AO 98-010 (Parks & Recreation grants: public perception of favoring Official’s local board)
- AO 98-011 (acceptance of expense-paid trip from vendor creates an appearance of impropriety)
- AO 98-015 (Official’s participation in hiring process for job he applied for creates appearance)
- AO 98-026 (involvement with professional organizations can cause an appearance of conflict)
- AO 99-001 (school owners have a potential conflict when dealing with their own interests)
- AO 99-002 (rental of ski condo to vendor could cause appearance of conflict of interest)
- AO 99-011 (awarding contract to Official’s spouse would create an appearance of conflict)
- AO 99-012 (performing outside work for company doing business with State creates appearance)
- AO 99-013 (acceptance of gift from prior grant recipient could create appearance of conflict)
- AO 99-014 (general discussion: intent of EO 127; different standards in different contexts)
- AO 99-018 (appearing before public body as representative of other organization; recusal)
- AO 00-004 (potential conflict due to appointment of “interested” persons to public body)
- AO 00-006 (potential conflict due to appointment of “interested” persons to public body)
- AO 01-001 (potential conflict; general rules; appearance of conflict; *intent* to acquire financial interest)
- AO 01-003 (conflict/appearance of conflict due to public body co-sponsoring continuing education course)
- AO 01-004 (Public Officials’ connections to grant applicants)
- AO 02-002 (member/school owner’s involvement in disciplinary action involving former student)
- AO 02-003 (NC Medical Board: involvement with PAC; solicitation of licensees by Board Member)
- AO 03-001 (contract employment with environmental advocacy organization)
- AO 03-002 (Public Official’s membership in related trade association)
- AO 04-002 (unrelated lawsuits with no conflict/appearance of conflict allegations against Public Officials)
- AO 05-002 (serving on a board with one’s employer was an apparent and actual conflict of interest)

**AO-04-002 (April 26, 2004):** With no allegations of conflict of interest against any RRC member, the Board determined that a lawsuit, in and of itself, against the RRC did *not* create a conflict of interest or the reasonable appearance of conflict under Executive Order Number One which would prevent the Commission from performing its statutorily-mandated function. The RRC could continue to determine the validity of rules promulgated by either the EMC or the Pharmacy Board while current litigation against the RRC initiated by those agencies was pending.

**AO-01-003 (March 22, 2001):** A public body's co-sponsoring of its legally-required continuing education program with trade associations whose members are licensed and regulated by the public body could create the appearance of a conflict of interest or some undue connection between the public body and the trade associations. The Mortuary Science Board ("MSB") is required by statute to offer continuing education courses to its licensees. While the primary goal is not to make a "profit," the MSB has made a relatively small amount of money on these courses in the past. Recently, one of the two relevant North Carolina trade associations approached the MSB about co-sponsoring the continuing education program. The MSB agreed after inviting the other trade association to also take part in the program. As a result, the MSB and the two trade associations have co-sponsored two such programs, splitting expenses and any resulting profits. The MSB licenses and regulates members of the two trade associations, but otherwise has no direct regulatory contact with the associations themselves.

The basic rule of conduct for covered Public Officials is that they must perform their official duties in a manner to promote the best interests of the public. EO One, § 7. This encompasses avoiding both conflicts of interest and the appearance of conflicts of interest. Conflict of interest rules are aimed primarily at avoiding undue **financial** gain as a result of one's official position. The basic conflict provision is found in section 7 (a) (1). A Public Official shall not knowingly use his or her position in any manner which will result in financial benefit, direct or indirect, to not only the Official but also a business, organization, or group with which the Official is associated. EO One, § 7 (a) (1).

Public Officials must also make every effort to avoid even the appearance of a conflict of interest. This is a flexible, open-ended standard applicable on a case-by-case basis. An appearance of conflict exists when a reasonable person would conclude from the circumstances that the Official's ability to protect the public interest, or perform public duties, is compromised by personal interests. The "personal interests" that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. An appearance of conflict may exist even in the absence of a true conflict of interest.

The danger here lies in the possible perception that because the MSB and the trade associations are "partners" in the continuing education programs, association members will enjoy some advantages or benefits that non-members do not. Others may perceive a closer connection between the public regulator and the private organization than there really is. Yet another potential appearance is that the MSB is somehow encouraging individuals to join an association. Any one of these perceptions, if reasonable, would undermine public confidence that the MSB is acting in the best interest of the public as a whole as required by Executive Order Number One. In addition, voting to share "profits" with a private organization with which a board member is closely associated could run afoul of section 7 (a) (1) of the Order.

This is not to say that Public Officials are barred from any and all involvement with trade associations. Membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a *potential* conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, "the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties."

Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles.

**AO-01-001 (February 15, 2001):** At a minimum, there is a significant appearance of conflict when a Public Official participates in a decision that either impacts or could impact his or her private interest. Sensitivity is heightened where a business or financial interest is involved. The same reasoning applies where an Official *intends* to acquire an interest in a project under consideration. Potential conflicts, in and of themselves, are quite common and perfectly acceptable. The challenge is for Public Officials to guard against taking action that causes the “potential” conflict to become an actual conflict between the Official’s public duties and private interests. That could happen if a member votes on a request by his or her employer. More precisely, it could happen if the University representative on the Building Commission voted on the University’s petition for the use of an alternative means of construction. Again, at a minimum, it would create a significant appearance of conflict of interest for a Commissioner to vote on a request from his or her employer. The public could rightly question in whose best interest the decision was made: theirs or the employer’s? The reasonable assumption is that one’s primary loyalty lies with his or her employer in that situation, either from a general sense of loyalty, a fear of retaliation, or expectation of reward. Nor do statutorily-designated representatives of various interests have free reign on their respective public bodies. They must still recuse themselves when they are presented with the opportunity to judge their own work or the work of their employer or others with whom they are sufficiently connected or associated.

**AO-00-006 (July 13, 2000):** A member of the Marine Fisheries Commission asked about conflict of interest rules in general and the application of those rules to his particular situation given his membership on the board of directors of an advocacy group that proposed quasi-legislative action (presumably in the form of rulemaking) by the public body on which he served. Relying on an earlier opinion, the Board of Ethics found that in quasi-legislative situations such as this, Public Officials “should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding.” A “personal relationship” includes one in a policy-making position in an organization or group. A “participant” includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking. So, as a board member of an advocacy group actively petitioning the Commission to take quasi-legislative action, the member was advised that he should **not** participate in the Commission’s decision regarding such proposed action.

As a general matter, Public Officials are not automatically disqualified from participating in agency/board decisions simply because of their involvement, financial or otherwise, in the industry or area being regulated. In fact, such industry or organization involvement is often legislatively mandated, as it is for the MFC. When statutes require that interested persons be appointed to regulatory or licensing boards, the Board of Ethics generally does not find that such persons have an impermissible conflict of interest due to their personal or financial interest. The Board of Ethics does, however, find that these appointees have the **potential** for conflict of interest and must recuse themselves from discussing or voting on matters before the Board that will specifically impact or affect their business, license, or special interest group with which they are significantly involved. Nor will it affect the board member’s ability to participate in general regulatory decisions that will affect the industry as a whole. The degree of allowable participation, if any, must be determined on a case-by-case basis and varies depending upon the particular function being performed by the public body (e.g., quasi-legislative vs. quasi-judicial).

## **Designated Seat/Position on Public Body**

AO 88-005 (general principles; actual vs. potential conflict of interest)

AO 90-003 (industry member appointees; general principles)

AO 91-001 (industry members on licensing/regulatory boards have potential conflict; Banking Commission)



AO 98-002 (Marine Fisheries Commission)  
AO 98-005 (Environmental Management Commission)  
AO 98-010 (Parks & Recreation Authority; Question #5)  
AO 99-007 (Low-Level Radioactive Waste Management Authority; specific knowledge/expertise)  
AO 99-001 (Massage & Bodywork; school owners neither required nor prohibited from appointment)  
AO 99-007 (Authority must include members with technical and legal expertise in regulated area)  
AO 99-008 (Marine Fisheries Commission)  
AO 99-014, Question 1 (Coastal Resources Commission)  
AO 00-004 (interested persons required to be appointed to regulatory boards have potential conflict)  
AO 00-006 (interested persons required to be appointed to regulatory boards have potential conflict)  
AO 01-001 (statutorily-designated representatives do *not* have free reign on their respective public bodies)  
AO 03-002 (in passing re Public Official's membership in related trade association)  
AO 04-001 (Official in designated position on Commission for Health Services still had to recuse himself)

**AO-01-001 (February 15, 2001):** Statutorily-designated representatives of various interests do NOT have free reign on their respective public bodies. They must still recuse themselves when they are presented with the opportunity to judge their own work or the work of their employer or others with whom they are sufficiently connected or associated.

**AO-99-014 (July 7, 1999):** The fact that a Public Official occupies a designated seat required to be filled by someone actively associated with a particular organization does *not* make a difference for basic conflict of interest/appearance of conflict analytical purposes. Appointees to State boards and commissions are often selected to "represent" the perspective of different, even opposing, interests. Thus, the potential for "bias" in the sense of a general preference or inclination is intentionally built into the organizational structure. Traditionally, this is an acceptable part of the legislative/quasi-legislative process, like most rulemaking. Courts will generally not concern themselves with the underlying motives or rationale for legislative/quasi-legislative decisions, particularly if such motivations are non-financial. Partisan interests are superseded, however, by basic considerations of fairness and due process in judicial/quasi-judicial situations, such as contested cases, where an unbiased, impartial decision-maker is deemed essential. Most Coastal Resources Commission ("CRC") members are required to have certain backgrounds or fields of expertise, including one member "who at the time of appointment [is] actively associated with a State or national conservation organization." Two CRC members were members of conservation and/or environmental advocacy groups that appear regularly before the CRC. The fact that a CRC member occupies the seat required to be filled by someone actively associated with a State or national conservation organization does not make a difference in either quasi-judicial or quasi-legislative situations. Moreover, the fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of conflict of interest issues for members of the group who serve on State boards and commissions.

**AO-98-002 (March 11, 1998):** Members of the Marine Fisheries Commission are required to derive some part of their earned income from the resources the Commission regulates. The executive order on ethics [then EO 127] does not prohibit appointees appointed to represent the various viewpoints from carrying out their duties.

**AO-90-003 (October 4, 1990):** Regulatory and licensing boards have industry member appointees as mandated by their enabling statutes. While the Board of Ethics understands this requirement, it does not relieve Public Officials from their obligation to protect the statewide public interest.

**AO-88-005 (September 8, 1988):** The Board of Ethics acknowledged the fact that industry members are required to be on certain public bodies (like the Board of Cosmetology Examiners). However, holding public office is a public trust. Members are expected to lay aside their private affiliations and represent the public

interest while transacting the public's business. Industry members would either have an actual or potential conflict of interest. Members who are simply licensed by their public body would have the potential for conflict of interest and must not vote on anything that would affect them directly or exclusively.

## **Disqualification from one not disqualification from all (grant award)**

AO 98-010

**AO-98-010 (June 29, 1998):** Public Officials who were presently or formerly associated with or members of local governments or their advisory boards or commissions who were applying for grants from the Officials' public body (North Carolina Parks & Recreation Authority) are *not* disqualified from participating in all grant awards if they are disqualified from participating in one such matter. Authority members are appointed because of their backgrounds and experience. If they were prohibited from participation on other grant applications, the Authority would be rendered ineffective. To work effectively, members must be able to participate on other grant applications. The Board of Ethics' role is to provide advice on how to avoid conflicts and not to create situations where a public body cannot operate effectively.

## **"Due Diligence" Procedures for Identifying Conflicts**

AO 99-016 (Board of Transportation member and employer's internal screening procedures)

**AO-99-016 (September 14, 1999):** As a result of concerns about unintentionally overlooking a client or customer who does business with the public body on which the Public Official serves (the Board of Transportation), the Official and his employer/financial institution implemented internal "due diligence" procedures to identify and avoid such situations that could cause either a conflict of interest or the appearance of conflict in violation of the ethics order. Noting that the primary concern addressed by the Order is the willful, intentional misuse of public office for private gain, the Board of Ethics found that the Official had put in place reasonable measures to ensure that he did not knowingly use his official position in a manner which would result in a financial benefit to either the Official or his employer.

## **Employer-Employee Relationship**

AO 91-001 (Banking Commission member who is also officer of bank impacted by Commission decision)

AO 93-002 ("personal interest" includes employees or former employees)

AO 98-005 (potential conflict due to public agency's use of employer's data/analysis to make regulations)

AO 99-001 (Public Official have a potential conflict when considering matters involving their employees)

AO 99-007 (employee/Public Officials should not vote on a proposal their employers oppose on record)

AO 99-012 (performing outside work for person doing business with employee's primary employer)

AO 99-016 (employer's "due diligence" procedures to identify conflicts for employee/Public Official)

AO 99-018 (employee's participation in employer's request to public body would create appearance issue)

AO 00-007 (participation in quasi-legislative rulemaking; employer/employee relationship; major decision)

AO 01-001 (it would create an appearance of conflict for an Official to vote on his/her employer's request)

AO 01-004 (interests usually equated for conflict analysis)

AO 03-001 (contract employment with environmental advocacy organization)

AO 04-001 (Official was a consultant for petitioner before his own public body; equate employer-employee)

AO 05-002 (serving on a board with one's employer was an apparent and actual conflict of interest)

**AO-05-002 (June 13, 2005):** A member of the Hearing Aid Dealers & Fitters Board (“HADF” or “the Board”) disclosed in her annual Statement of Economic Interest (“SEI” or “Statement”) filed with the Board of Ethics (“BOE”) that she occasionally does occasional, secondary work for a fellow Board member. The employee-member here correctly perceived that serving on a regulatory-licensing board with her employer creates, at a minimum, the appearance of a conflict of interest. The Board of Ethics has noted as much in prior opinions. In the context of an employee-Public Official being in the position of passing on the formal request of his outside employer, the Board of Ethics stated, “The reasonable assumption is that one’s primary loyalty lies with his or her employer in that situation, either from a general sense of loyalty, a fear of retaliation, or expectation of reward.” The BOE also pointed out that the interests of employers and employees are usually equated for conflict of interest analysis. In the present situation, the BOE felt that a reasonable person could legitimately question whether the employee-member was acting independently in the public’s best interest or as her employer wished. Whether true or not, there could be a reasonable perception that the employer-member really has two votes on the public body due to his real or perceived influence over his employee.

The Board of Ethics has previously found that this situation involves more than an appearance of conflict, however. In 1987, the BOE was asked whether there would be an actual or potential conflict if a direct or indirect employer-employee relationship existed between two board members. The BOE found that there would be an *actual conflict* if such a relationship existed: “An employer-employee relationship between board members would present a financial interest, the very existence of which creates a conflict with the public interest.” The current Board of Ethics came to same conclusion that having an employer and employee serve on the same public body would create an *actual* conflict of interest. Moreover, this type of conflict cannot be cured by having the Public Official remove himself or herself from the decision-making process (recusal) because it would effectively eliminate a seat on the public body and thus alter its legislatively-established makeup. The source of the actual conflict must be removed. This could be done in a number of ways, and the parties involved, including the covered public body, are in the best position to decide how that should best be handled.

**AO-03-001 (July 18, 2003):** [NOTE: this opinion modified AO-00-007-B (October 9, 2000) and should be read in conjunction therewith.] A member of the Environmental Management Commission (“EMC” or “the Commission”) inquired whether given his recent change from full-time employment with an environmental advocacy organization to that of an independent contractor on a project-by-project basis, with a corresponding change in employment responsibilities, did the standards and restrictions of previous advisory opinions still apply? The Board found that some had changed. Mr. Besse’s employment relationship with CCNC changed from that of Conservation Political Director-employee to an independent contractor. He now provides contract services on a project-by-project basis. His initial contract involves writing and editing a weekly bulletin on state legislative and political environmental news. He will not regularly attend or participate in CCNC board meetings. Moreover, his present contract does *not* involve the solicitation of contributions from CCNC members, and Mr. Besse does not anticipate performing that type of service in the future.

In AO-00-007-B, the Board of Ethics established the general parameters for when Mr. Besse should be allowed to participate in (a) contested cases or (b) rulemaking proceedings involving (i) his employer (CCNC) or (ii) its members, given his financial and/or “personal” relationship with each. This significant opinion was extremely fact-driven. Indeed, the Board determined that despite a significant personal and financial relationship, Mr. Besse should generally be allowed to participate in rulemaking proceedings when either CCNC or its members merely **comment** on proposed rules. Likewise, on the other end of the spectrum, Mr. Besse should not participate in either a contested case involving his contract employer, CCNC, or in a rulemaking proceeding when CCNC is the petitioner.

The most difficult question involves Mr. Besse's possible participation when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding. In AO-00-007-B, the Board found that Mr. Besse should *not* participate when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding "[b]ecause of the significant relationship, both financial and otherwise, between Mr. Besse, CCNC, and CCNC's members." The Board made it clear that it was dealing with "a significant, and perhaps even extreme, financial interest" in the original Besse situation. That situation appears to have changed. Consequently, based on the facts of this case, the Board determined that Mr. Besse should *generally* be allowed to participate in both contested cases and rulemaking proceedings when a *mere* CCNC member is a participant. There are many caveats, however, and Mr. Besse was advised to exercise extreme caution to avoid real or apparent conflicts in particular cases.

**AO-01-001 (February 15, 2001):** Voting on a request by an Official's employer could cause a "potential" conflict to become an actual conflict between the Official's public duties and private interests. Specifically, it could happen if the University representative on the Building Commission voted on the University's petition for the use of an alternative means of construction. Again, at a minimum, it would create a significant appearance of conflict of interest for a Commissioner to vote on a request from his or her employer. The public could rightly question in whose best interest the decision was made: theirs or the employer's? The reasonable assumption is that one's primary loyalty lies with his or her employer in that situation, either from a general sense of loyalty, a fear of retaliation, or expectation of reward.

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members. It sometimes provides public comments on relevant State administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). The Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules. See also AO 03-001 (contract employment with environmental advocacy organization)

**AO-99-018 (September 21, 1999):** The Public Official is employed by a private non-profit community organization which makes requests (including requests for funding) of the public body on which the Official serves (the NC Human Relations Commission). The Board of Ethics stated that in order to avoid the appearance of conflict of interest, the Official should neither appear before the public body as a representative of her private employer nor participate in decisions involving her employer.

**AO-99-016 (September 14, 1999):** As a result of concerns about unintentionally overlooking a client or customer who does business with the public body on which the Public Official serves (the Board of Transportation), the Official and his employer/financial institution implemented internal "due diligence" procedures to identify and avoid such situations that could cause either a conflict of interest or the appearance of conflict in violation of the ethics order. Noting that the primary concern addressed by the Order is the willful, intentional misuse of public office for private gain, the Board of Ethics found that the Official had put in place reasonable measures to ensure that he did not knowingly use his official position in a manner which would result in a financial benefit to either the Official or his employer.

**AO-93-002 (August 27, 1993):** Public Officials should not participate in, vote on, influence, or attempt to influence the decision to license an individual if they have a "personal interest" in the outcome or a "reasonably foreseeable benefit" from the outcome. "Personal interest" and "reasonably foreseeable benefit" include Public Officials' employees or former employees. Thus, licensing board members who are former

employers of license applicants should not participate in, vote on, influence, or attempt to influence any matters pertaining to their former employee's licensure or disciplining.

## **Familial Interests**

AO 88-003 (stockholdings by spouse and adult children)

AO 99-011 (spouse's interest in company hoping to do business with public body)

AO 01-004 (husband is mayor of town applying for grant from wife's public body)

AO 05-002 (footnote reference to serving on a board with a spouse; comparison to employers-employees)

**AO-99-011 (June 14, 1999):** All of the public body's computer programming work was done by outside contractors. One outside company bidding for such work is solely owned by the spouse of a board member. At a minimum, voting to award a contract to the member's spouse's company would create an appearance of conflict of interest. The board should also consider N.C.G.S. §14-234 in this context.

## **Financial Interests, in General**

AO 89-003 (Utilities Commissioner's ownership of mutual funds did not cause a conflict of interest)

AO 90-004 ("financial interest" includes employment, stock ownership, etc.)

AO 91-001 (a "reasonably foreseeable benefit" includes a detriment to a business competitor)

AO 98-002 (general rule: financial interests affected more than others in regulated community)

AO 98-004 (general rule: financial interests affected more than others in regulated community)

AO 98-005 (in context of employer-employee relationship)

AO 99-005 (Official cannot use confidential information to benefit a personal financial interest)

AO 99-008 (Official who is one of top producers in regulated industry should neither vote nor lobby)

AO 99-014 (includes salary from businesses or governmental entities, consultant fees, and directorship fees)

AO 99-015 (official act would bestow no reasonable, measurable financial benefit on organization/Official)

AO 99-017 (apparent competitive advantage from conducting program reviews while a sitting Official)

AO 00-004 (access to competitors' business information creates significant potential for conflict/appearance)

AO 00-007 (actual or perceived financial benefit was not a direct, tangible benefit in the traditional sense)

AO 01-001 (appearance re projects in which Officials have interest; *intent* to acquire financial interest)

AO 01-003 (sharing "profits" with trade association could result in "financial gain")

AO 01-004 (spouse's interest as mayor of town applying for grant is not typical "financial benefit")

AO 02-002 (member/school owner's involvement in disciplinary action involving former student)

AO 02-003 (includes financial benefit to organization or group; solicitation of licensees by Board Member)

AO 03-001 (contract employment with environmental advocacy organization)

AO 04-001 (Official was a consultant for petitioner before his own public body; equate employer-employee)

AO 05-001 (in the context of teaching in-house continuing education and exam review courses)

AO 05-002 (serving on a board with one's employer was an apparent and actual conflict of interest)

**AO-00-007-B (October 9, 2000):** Any actual or perceived financial benefit to the Public Official or his advocacy organization employer was not a direct, tangible financial benefit in the traditional sense. Neither the Official (EMC member) personally nor his employer as an organization would likely directly benefit from adoption or not of a particular rule. Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members. It sometimes provides public comments on relevant State

administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). See AO 03-001 (contract employment with environmental advocacy organization)

**AO-00-004 (March 20, 2000):** Public Official may not use information gained in the course of, or by reason of, his or her official responsibilities in a way that would affect a personal financial interest of the Public Official or a business with which the Official is associated. Nor can a covered Public Official improperly use confidential information. The situation whereby a sitting board member may have access to sensitive business information of competitors, particularly financial information, creates a significant potential for conflict and the appearance of conflict. The board member in question must exercise extreme caution in this situation. Situation involved dual financial interests: that of the board member and his potential competitors. The Board found that it would create, at a minimum, an appearance of conflict for an Official who is also a school owner to review and approve schools **if** he has to review confidential business information (including financial information) in order to do so.

**AO-99-014 (July 7, 1999):** “Financial interests” include such pecuniary interests as salary or wages from businesses or governmental entities, consultant fees, and directorship fees from both profit and nonprofit entities. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite “personal relationship.” A “participant” in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking. In all situations, a “personal interest” includes close family or business (both profit and nonprofit) associations.

## **Former/Past Association with an Organization or Group**

AO 98-010 (former member of local government advisory board requesting grant from public body)  
AO 98-014 (former mayor of city involved in rulemaking proceeding before Official’s public body)  
AO 00-004 (Public Official/current chair is former chairman of related trade organization)  
AO 00-008 (former mayor of city involved in contested case proceeding before Official’s public body)  
AO 02-002 (member/school owner’s involvement in disciplinary action involving former student)  
AO 03-001 (former full-time employment with environmental advocacy organization)

**AO-03-001 (July 18, 2003):** [NOTE: this opinion modified AO-00-007-B (October 9, 2000) and should be read in conjunction therewith.] A member of the Environmental Management Commission (“EMC” or “the Commission”) inquired whether given his recent change from full-time employment with an environmental advocacy organization to that of an independent contractor on a project-by-project basis, with a corresponding change in employment responsibilities, did the standards and restrictions of previous advisory opinions still apply? The Board found that some had changed. Mr. Besse’s employment relationship with CCNC changed from that of Conservation Political Director-employee to an independent contractor. He now provides contract services on a project-by-project basis. His initial contract involves writing and editing a weekly bulletin on state legislative and political environmental news. He will not regularly attend or participate in CCNC board meetings. Moreover, his present contract does *not* involve the solicitation of contributions from CCNC members, and Mr. Besse does not anticipate performing that type of service in the future.

In AO-00-007-B, the Board of Ethics established the general parameters for when Mr. Besse should be allowed to participate in (a) contested cases or (b) rulemaking proceedings involving (i) his employer (CCNC) or (ii) its members, given his financial and/or “personal” relationship with each. This significant opinion was extremely fact-driven. Indeed, the Board determined that despite a significant personal and financial relationship, Mr. Besse should generally be allowed to participate in rulemaking proceedings when either CCNC or its members merely **comment** on proposed rules. Likewise, on the other end of the spectrum, Mr. Besse should not participate in either a contested case involving his contract employer, CCNC, or in a rulemaking proceeding when CCNC is the petitioner.

The most difficult question involves Mr. Besse’s possible participation when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding. In AO-00-007-B, the Board found that Mr. Besse should *not* participate when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding “[b]ecause of the significant relationship, both financial and otherwise, between Mr. Besse, CCNC, and CCNC’s members.” The Board made it clear that it was dealing with “a significant, and perhaps even extreme, financial interest” in the original Besse situation. That situation appears to have changed. Consequently, based on the facts of this case, the Board determined that Mr. Besse should *generally* be allowed to participate in both contested cases and rulemaking proceedings when a *mere* CCNC member is a participant. There are many caveats, however, and Mr. Besse was advised to exercise extreme caution to avoid real or apparent conflicts in particular cases.

**AO-00-008 (September 11, 2000):** The Public Official/former mayor of a municipality involved in a contested case proceeding before the Official’s public body (EMC) inquired whether he had an impermissible conflict of interest or appearance of conflict due to his prior association with the municipal party. The Official had been the mayor for 10 years, but had not represented or been officially connected with the municipality for nearly 19 years. The City is now a party to a contested case pending before the EMC. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. This could include, under appropriate circumstances, a **former** association or relationship with a participant in a covered proceeding. Determining factors would include the nature of the former association or relationship, the length of time separating it from the current public position or function, and the type of proceeding being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative). In this case, the extreme gap of time was sufficient to eliminate a reasonable perception of impermissible bias. [See also AO-98-014 involving the same Public Official/body, but re rulemaking.]

**AO-00-004 (March 20, 2000):** A licensing/regulatory board asked about conflict/appearance of conflict issues relating to, among other things, a Public Official’s service as chairman of the public body given his prior position as chairman of a related trade organization. The Public Official/chairman resigned his leadership position in the trade association approximately two weeks prior to commencing service on the public body. Drawing support from an earlier opinion (AO-98-010), the Board of Ethics determined that it was not a conflict of interest for the Public Official to serve as chairman of the public body after having served in the same capacity for the related trade organization.

**AO-98-014 (July 31, 1998):** The Public Official/former mayor of a municipality involved in rulemaking asked whether he had a disqualifying conflict of interest due to his prior association with the municipal party. The Official had not held a public office in the municipality for 17 years and currently holds no official position with any other governmental agency in the region. The public body (EMC), and thus the Official, is now being asked to choose between two sets of land use controls, one of which will impose greater duties on local governments, like the Official’s former employer. The Board found that the passage of 17 years removed the potential for a conflict of interest based on the prior local government service. The Official was advised to disclose his prior position with the municipal participant and consider whether he was biased in its favor. [See also AO-00-008, involving the same Public Official in a contested case.]

**AO-98-010 (June 29, 1998):** Public Officials having, through elected positions or otherwise, interests in projects under consideration for grants from their public body inquired about conflicts/appearances of conflict with regard to the same. *Former* members of a local government's board or commission applying for a grant should disclose their past relationship with the grant applicant and discuss with fellow members any concerns of bias toward favoring that applicant over others. In cases of doubt, the presiding officer determines the extent to which, if any, the Official will be allowed to participate, according to the Order.

## **Gifts & "Freebies"**

AO 83-003 (expense-paid trip to France)  
AO 96-002 (from foreign countries/during overseas trips)  
AO 97-003 (donation of computer equipment to State)  
AO 98-011 (expense-paid business trip to visit prospective contractor)  
AO 98-016 (solicitation of gift incentives from other State agencies/United Way)  
AO 98-019 (reception and dinner in honor of Public Officials)  
AO 99-002 (rental of ski condo to vendor)  
AO 99-010 (State agency's solicitation of gifts or donations)  
AO 99-013 (gift from prior/prospective grant recipient; general discussion of gifts)  
AO 00-001 (open social events at national conferences sponsored by trade associations; §133-32 discussed)

**AO-00-001 (January 20, 2000):** Among other things, the Commission licenses all real estate brokers and salesmen in the State of North Carolina. The Commission also has the power to regulate and discipline such brokers and salesmen. The Commission is a member of the Association of Real Estate License Law Officials ("ARELLO"), an association of government real estate license law officials and administrators from the United States, Canada, and other countries. ARELLO is scheduled to conduct its midyear meeting in Wilmington, North Carolina in the spring of 2000. As part of this meeting, the North Carolina Association of Realtors ("NCAR" or "the Association") may sponsor or co-sponsor a social event for all ARELLO members in attendance, not just the North Carolina delegation or members of the Commission. The Association is the predominant trade association for real estate practitioners in North Carolina, and some if not most of its members are licensed and regulated by the Commission. Neither ARELLO nor the Association is a covered board, commission, or council under EO 127.

Executive Order 127 [now Number One] does not directly address the question of when gifts or other favors (such as meals, tickets to sporting events, or expense-paid visits to potential vendors) are ethically proper. Instead, this would come under the section on conflicts of interest and appearances of conflict of interest. However, the Board drew analytical support from a gifts and favors statute. Section 133-32 involves gifts and favors from public contractors to State officials and employees and makes it unlawful for any contractor, subcontractor, or supplier who (1) has a contract with a governmental agency, (2) has performed under such a contract within the past year, or (3) anticipates bidding on such a contract in the future **to give gifts or favors to any government officer or employee** who is charged with the duty of (a) preparing plans, specifications, or estimates for public contracts, (b) awarding or administering public contracts, or (c) inspecting or supervising construction. It is also unlawful for any officer or government employee to **receive or accept any such gift or favor**. Violation of this provision is a criminal offense.

There are, however, several significant exceptions to this general prohibition of gifts and favors. For example, section 133-32 "is not intended to prevent any contractor, subcontractor, or supplier from making donations to professional organizations to defray meeting expenses where governmental employees are members of such professional organizations, nor is it intended to prevent governmental employees who are members of professional organizations from participation in all scheduled meeting functions **available to all members of the professional organization attending the meeting.**" One commentator has interpreted this



provision to mean that "a contractor might host a hospitality room at a professional association's annual conference, as long as it was open to all association members attending the meeting." This appears very similar to the present situation.

In the present situation, the problem is not compromising the public trust for some reception or banquet, but rather the potential perception or appearance that the sponsor (here, the Association) would be gaining some unfair advantage or influence over the public body that regulates its members. That risk is mitigated by virtue of the fact that the proposed social event (be it a hospitality room, reception, or some other reasonable and customary meeting-related event) is open to **all members** of the host organization (ARELLO), which is international in scope. This was found consistent with not only §133-32 but also a reasonable interpretation of the Order, which is intended to protect the public interest, not prevent Public Officials from attending beneficial meetings clearly within the scope of their official duties and functions. Therefore, members of the Real Estate Commission and its staff were free to attend an Association-sponsored social event at the midyear meeting.

**AO-99-013 (June 24, 1999):** Among other things, the Parks and Recreation Authority ("the Authority") approves matching grants from the Parks and Recreation Trust Fund ("PARTF") to local governments. In 1997, the Town of Lewisville received a matching grant from the Authority to develop Shallowford Park. As part of a fundraiser for future development of the park, framed prints created by a local artist are being sold for \$74.14. In appreciation for the PARTF grant, the Town of Lewisville would like to give all 11 members of the Authority one of the framed prints. The Town is eligible to apply for and receive other PARTF grants in the future.

Questions regarding gifts to public officials are some of the most common and most troubling in the ethics field. They are troubling not because of their factual or analytical complexity, but rather because they so often appear to require the seemingly harsh application of overprotective rules. At least that is the way answers to these questions are often perceived. It is often difficult to see the potential harm in a well-intentioned expression of genuine gratitude. Just as it is human nature to want to express such gratitude in a tangible way, however, it is also human nature to feel a return debt of gratitude and to question, at least for the non-recipient, the giver's motive and the recipient's response.

Gifts to Public Officials can cause at least three problems. The first involves a direct conflict of interest. A Public Official shall not knowingly use his or her position in any manner which will result in financial benefit, direct or indirect, to the Official or an individual with whom or business with which the Official is associated. Nor shall a Public Official, directly or indirectly, accept, receive, or agree to receive anything of value for himself or herself or for another person in return for being influenced in the discharge of his or her official responsibilities. Finally, a Public Official shall not receive personal financial gain, other than that received by the Official from the State for acting in his or her official capacity, for advice or assistance given in the course of carrying out the Public Official's duties.

Since issuance of the PARTF grant by the Authority preceded the proffered gift by two years, there is no question of Authority members knowingly using their position to obtain a "financial benefit" or receiving something of value "in return for being influenced" in the grant decision. Indeed, the print was not in existence at the time the grant was awarded. Nor is it a case of receiving "personal financial gain" for assistance given in the course of carrying out official duties. Thus, this does not appear to be a case of direct conflict of interest. (A conflict of interest could arise in a situation where the "value" was given after, rather than prior to or contemporaneous with, the official action. Among other things, this would depend upon the type of "financial benefit" or "thing of value," the length of time between the giving of the same and the official act in question, and the existence of any other evidence of a wrongful connection between the two. Like most ethics questions, it would have to be determined on a fact-specific, case-by-case basis.)

The second gift-related problem relates to public perception. Public Officials must make every effort to avoid even the **appearance** of a conflict of interest. An appearance of conflict may exist even in the absence of a true conflict of interest. If Authority members accept gifts from former grant recipients, no matter how innocent or pure the parties' motives, it could create the appearance of a conflict. This is particularly true if the giver (here, the Town) applies for another PARTF in the future. In the present situation, the problem is not the bargaining away of the public trust for some token of appreciation, but rather the potential perception or appearance that the giver would be gaining or attempting to gain some unfair advantage or influence in the future.

The third problem is closely related to, and perhaps a subset of, the appearance issue. Because of conflict or appearance of conflict concerns, Authority members who have accepted gifts from former grant recipients might be prohibited from participating in the decision to award such grants to those entities in the future. Thus, as a practical matter, the Authority's group acceptance of such a gift could have the unintended and unfortunate effect of impeding the performance of its assigned duties and harming an otherwise deserving grant recipient.

**AO-98-019 (June 24, 1999):** Attending a reception and dinner given by a major business and industry organization whose members regularly participate in proceedings before the public body (the Environmental Management Commission) could create an appearance of conflict of interest.

**AO-98-011 (July 14, 1998):** A state employee was invited to visit a prospective vendor's out-of-state facility at the vendor's expense. Any contracted services through the employee's department would have to be bid in accordance with applicable state rules and regulations. Relying on earlier opinions, the Board of Ethics found that accepting an all expense-paid trip by a company seeking to do business with the state could give rise to an appearance of impropriety.

## **Grants**

AO 98-010 (Parks & Recreation Trust Fund grants; various connections to grant applicants)

AO 99-013 (gift from prior/prospective grant recipient)

AO 99-014, footnote 6 (issuing grants is a quasi-judicial-type decision)

AO 00-002 (Officials should not vote on grant requests from their own agencies)

AO 00-005 (connection between grant applicant and review committee's appointing authority; "Sea Grant")

AO 01-004 (Parks & Recreation Trust Fund grants; Public Officials' connections to applicants)

**AO-01-004 (April 27, 2001):** One of the Parks & Recreation Authority's responsibilities is to approve matching grants from the Parks and Recreation Trust Fund ("PARTF") to local governmental units for local park and recreation purposes. An Authority member whose spouse is the mayor of a town applying for a PARTF grant should not discuss or vote on the town's grant application. Generally, the interests of not only husbands and wives but also employers and employees are equated for conflict of interest analysis purposes. Thus, any financial benefit accruing to the spouse or his employer as a result of the grant award would be attributed to the Authority member. Likewise, the Board of Ethics has previously found that an elected official of a local government applying for a PARTF grant has a conflict of interest and may not participate in any discussion or voting on that particular grant application. Moreover, a reasonable person would question the Authority member's objectivity when the town of which her spouse is the mayor is the applicant for a PARTF grant. Also, given the fact that a grant award is a quasi-judicial-type decision, the "reasonable and appropriate step" in this case is total recusal from the decision-making process, including discussion or "lobbying."

Another Authority member serves on an advisory sub-committee to a county applying for a grant that was recommended by a totally separate advisory committee in the same county. The member in question is from one of North Carolina's largest counties which has created several levels of advisory bodies to study and make recommendations regarding various local parks and recreation issues. Specifically, each of the county's nine park districts has a separate and distinct "advisory committee." These separate advisory committees report to and are overseen by a 13-member Parks and Recreation Commission which is appointed by the county commissioners. The nine advisory committees operate independently of one another and make separate recommendations to "district supervisors" for routine matters and the Parks and Recreation Commission for larger or multi-district issues. The member in question serves on the county advisory committee for one such district. The county has applied for a PARTF grant in *another* district. Neither the member nor his particular advisory committee was involved in the preparation, review, or presentation of this separate grant proposal. Distinguishing an earlier opinion which prohibited an active member of a local government's parks and recreation advisory board from voting on the local government's grant proposal (AO-98-010), the Board of Ethics found that the Authority member here should generally be allowed to participate fully in the Authority's decisions regarding grant requests from and relating to other districts.

**AO-00-005 (March 16, 2000):** A special "grants committee" of the Fishery Resource Grant Program inquired as to whether awarding a grant to the employee of the chairman of the Marine Fisheries Commission ("MFC") who had a connection to both the grant applicant (as a listed "participant" in and supporter of the proposed study) and the body assigned to pass judgment on the application (the "grants committee" through his two appointees to that committee) would constitute either a conflict of interest or the appearance of a conflict of interest. After an extensive screening process (including an anonymous peer review), the committee evaluates all grant proposals and determines the amount of funding, if any, to be awarded to each grant applicant. This is in effect the "final decision" on the grant application. The grant applicant works for the same company as the MFC chairman and such company has offered to allow the applicant to use its facilities during the initial part of the proposed study. Neither the chairman nor the company will have any involvement with or responsibility for actual project completion. Nor will they receive any financial benefit for allowing the applicant to use their facilities for the study.

The Board of Ethics found that considering the grant request under these circumstances would create neither an actual conflict of interest nor enough of a reasonable appearance of conflict of interest to taint the grant process, particularly in the absence of any indication that either the chairman or his company would receive any compensation for allowing the applicant to conduct her research at their facilities. The Board did not feel that the connection between the applicant, the chairman, and the decision-making body was sufficient to create an actual or reasonably perceived conflict of interest. The Board noted, however, that if the two committee members appointed by the chairman felt that their personal relationship with the chairman was such that they could not give an unbiased review of the applicant's grant request, they should disclose such relationship to the presiding officer, seek appropriate guidance, and consider removing themselves from the process.

**AO-00-002 (February 4, 2000):** The Governor's Crime Commission ("the Commission") inquired about conflicts of interest and the appearance of conflicts of interest in the context of sub-committee members participating in grant recommendations when a State agency with which they are connected is the potential recipient of such grant. Among other things, the Commission assists the Secretary of Crime Control and Public Safety ("the Secretary") in making grants for use in pursuing the Commission's objectives. Before a final decision is made, the Commission utilizes various committees and sub-committees to evaluate grant pre-applications. Ultimately, sub-committees make recommendations to an Executive Committee which then makes a recommendation to the full Commission.

When a Commissioner's own agency appears before the full Commission concerning a grant request from an agency or group with which they are connected or in which they have an interest, the interested member should not participate in voting or discussion in order to avoid a conflict of interest or the appearance of a conflict. The Board also supported the Commission's internal policy which allowed members of subcommittees to answer questions about a grant application from an agency or group with which they are connected or in which they have an interest, but does not to allow those persons to vote on such grant request.

**AO-99-014 (July 7, 1999):** "Decisions determining individual rights or benefits (like grant awards) would usually require application of [higher] quasi-judicial standards of conflict of interest/bias." "CRC Opinion," (in passing) page 3, footnote 6.

**AO-99-013 (June 24, 1999):** A public body's acceptance of gifts from past or prospective grant applicants can cause conflict of interest or appearance of conflict problems.

**AO-98-010 (June 29, 1998):** Public Officials having, through elected positions or otherwise, interests in projects under consideration for grants from their public body inquired about conflicts/appearances of conflict with regard to the same. The Board of Ethics advised *active members* of a local government's board or commission which was applying for a grant from the Official's public body (the Parks and Recreation Authority) to recuse themselves from voting on the grant application from the local government they serve. To actively participate in the discussions or final decisions regarding grant applications from the Official's own local government could cause an impermissible appearance of conflict of interest in violation of the Order. The Official may, however, provide information to other members that may be helpful to the public body's evaluation of the grant proposal. *Elected officials* of local governments applying for grants would have an actual conflict of interest and cannot participate in discussion or voting on that grant application. *Former members* of a local government's board or commission applying for a grant should disclose their past relationship with the grant applicant and discuss with fellow members any concerns of bias toward favoring that applicant over others. In cases of doubt, the presiding officer determines the extent to which, if any, the Official will be allowed to participate, according to the Order.

Where the ethics order requires an Official to withdraw from participation in deciding one particular grant application because of a conflict or appearance of conflict of interest, he or she need not withdraw from participation in deciding **all other** grant applications. If Officials were prohibited from participation on other grant applications, the public body would be rendered ineffective. The Board of Ethics' role is to provide advice on how to avoid conflicts and not to create situations where a public body cannot operate effectively. Thus, the Board recommended that the Public Officials participate unless they personally believed that they could not give an unbiased review of the other grant applications. This is a determination that any member to a public board, commission, or authority must make when serving in a position of public trust. See also AO-01-004 (April 27, 2001).

## **Hospitality Rooms**

AO 00-001 (open social events at national conferences sponsored by trade associations; §133-32 discussed)

**AO-00-001 (January 20, 2000):** The predominant trade association for real estate practitioners in North Carolina planned to sponsor an open social event at the midyear meeting of an international "trade association" of which the public body (North Carolina Real Estate Commission) is a member. The planned social event will be for all members, not just the North Carolina delegation or members of the Commission. Some if not most of the trade association's members are licensed and regulated by the Commission. While the ethics Order does not directly address the question of when *gifts or other favors* are ethically proper, the

Board drew analytical support from a related statute (§133-32) and found that members of the Real Estate Commission and its staff were free to attend an Association-sponsored social event at the midyear meeting. The Board noted that an exception in the gifts and favors law probably allows a contractor to host a *hospitality room* at a professional association's annual conference, as long as it is open to all association members attending the meeting.

## **Jurisdiction**

AO 89-006 (Attorney General's office is the appropriate agency to advise regarding statutory prohibitions)  
AO 93-003 (gubernatorial appointees to the NC Railroad Board of Directors are covered by ethics Order)  
AO 98-018 (director and associate director of NC Museum of Art are subject to the ethics Order)  
AO 98-021 (no jurisdiction over advisory boards)  
AO 99-001 (Massage & Bodywork; legal questions)  
AO 99-004 (Department/Board of Transportation; interpretation of statutes is not the Board of Ethics' role)  
AO 99-010 (the Board is not charged with giving legal interpretations of other statutes; the law controls)  
AO 99-012 (Department/Board of Transportation; State Personnel Manual re secondary employment)  
AO 99-016 (Department/Board of Transportation)  
AO 00-002 (Governor's Crime Commission; NCGS §14-234 and the Commission's bylaws)  
AO 00-003 (Department/Board of Transportation)  
AO 01-001 (State Building Commission; other statutes and rules; law controls)  
AO 01-002 (Geologists Licensing Board; Open Meetings Law; law controls)  
AO 02-001 (Board does not dictate how public body gathers information prior to making official decision)  
AO 04-001 (advisory bodies & Officials serving on ad hoc advisory sub-committees)  
AO 04-002 (Board has limited jurisdiction and covers individuals, not their public bodies)

**AO-04-002 (April 26, 2004):** The Board of Ethics has limited jurisdiction. Executive Order Number One covers individuals, not the public bodies on which they serve. It was never contemplated that the Board would generally involve itself in telling boards and commissions how to conduct their substantive business absent a legitimate conflict of interest issue. Even then, the Board would not try to prohibit the commission from doing its statutorily-mandated job; rather it would address the situation from the perspective of whether individual Public Officials should participate in the decision-making process given their particular situations (*i.e.*, their personal, familial, or financial bias or conflict).

**AO-01-002 (February 7, 2001):** The Board of Ethics is not charged with giving legal interpretations of potentially applicable statutes (like the Open Meetings Law). Definitive interpretation of applicable statutes, rules, or policies is a matter for the public body's legal counsel. The Board is charged with interpreting and enforcing the ethics Order. Any conflict between a provision of the Order and other North Carolina law is resolved in favor of the law.

**AO-00-003 (March 21, 2000):** The Department of Transportation ("the Department" or "DOT") and the Board of Transportation ("BOT") are covered by other ethics laws, rules, and policies. For example, North Carolina General Statutes ("NCGS") §143B-350 (k) deals with the BOT's ethics policy in general and conflicts of interest/appearances of conflict in particular. Definitive interpretation of these and other applicable statutes and policies, as well as their specific application to individual situations, is a matter for the Department's legal counsel. The Board of Ethics is charged with interpreting and enforcing the Governor's executive order on ethics [currently Executive Order Number One]. Any conflict between a provision of the Order and other North Carolina law is resolved in favor of the law.

**AO-99-010 (May 25, 1999):** Interpretation of the Executive Budget Act and other laws is not the Board of Ethics' role. Any conflicts between the ethics Order and other North Carolina law is resolved in favor of the law.

## **“Legal Bias”**

AO 99-014 (CRC opinion – “bias” as a general preference and “legal bias”)

AO 00-007 (EMC – bias due to employment by advocacy organization & dealings with its members)

AO 00-008 (EMC – bias from prior association with party & “legal bias”)

AO 01-001 (higher degree of impartiality is required in quasi-judicial type decisions, involving “legal bias”)

AO 02-002 (member/school owner's involvement in disciplinary action involving former student)

AO 03-001 (contract employment with environmental advocacy organization)

AO 03-002 (in passing re Public Official's membership in related trade association)

AO 04-001 (in passing)

**AO-01-001 (February 15, 2001):** A higher degree of impartiality is required in quasi-judicial type decisions, where Officials must avoid “legal bias.” What constitutes legal bias is a question of law for the public body and its legal counsel. See footnote 3, page 4.

**AO-00-008 (September 11, 2000):** Because the proposed action was quasi-judicial in nature (making a final decision in a contested case), legal impartiality was required, and the Public Official was required to avoid both conflicts of interest and bias. What constitutes **legal bias** is a question of law for the public body and its counsel. However, as pointed out in AO-99-014 (the CRC opinion), North Carolina courts have found that legal bias may include (1) preconceptions about facts, policy, law, a person, a group, or an object, (2) a personal interest in the outcome of some determination, (3) a fixed opinion that is not susceptible to change, (4) an undisclosed ex parte communication, or (5) a close familial or business relationship with an applicant.

**AO-00-007-B (October 9, 2000):** The Board of Ethics pointed out that what constitutes “legal bias” in the context of contested cases is a matter of law for the public body and its legal counsel. See AO 03-001, footnote 1 (general statement)

**AO-99-014 (July 7, 1999):** Appointees to State boards and commissions are often selected to “represent” the perspective of different, even opposing, interests. Thus, the potential for “bias” in the sense of a general preference or inclination is intentionally built into the organizational structure. Traditionally, this is an acceptable part of the legislative/quasi-legislative process, like most rulemaking. Courts will generally not concern themselves with the underlying motives or rationale for legislative/quasi-legislative decisions, particularly if such motivations are non-financial. Partisan interests are superseded, however, by basic considerations of fairness and due process in judicial/quasi-judicial situations, such as contested cases, where an unbiased, impartial decision-maker is deemed essential. In **quasi-judicial proceedings**, legal impartiality is required, and the member must avoid both conflict of interest and bias. According to the North Carolina Supreme Court, **legal bias** may include preconceptions about facts, policy, or law; a person, group, or object; or a personal interest in the outcome of some determination. Likewise, a fixed opinion that is not susceptible to change, an undisclosed ex parte communication, or a close familial or business relationship with an applicant may constitute impermissible bias. These determinations will need to be made on a fact-specific, case-by-case basis.

## **“Lobbying”/Trying to influence a Decision or Vote**

AO 90-003 (should not participate, vote, influence or attempt to influence)  
AO 91-001 (should not influence or attempt to influence matters)  
AO 93-002 (should not influence or attempt to influence matters)  
AO 99-008 (member can express industry position but not vote or lobby other members regarding plan)  
AO 00-002 (Crime Commission advisory sub-committees; interested members cannot lobby or vote)  
AO 01-001 (disqualification due to a conflict extends to trying to influence the decision or outcome)  
AO 01-004 (recusal from process includes discussion and “lobbying”)  
AO 04-001 (general discussion; should not influence or attempt to influence matters; scope of recusal)

**AO-01-004 (April 27, 2001):** Given the fact that a grant award is a quasi-judicial-type decision, the appropriate degree of removal from the particular decision was total recusal from the decision-making process, including discussion and “lobbying.”

**AO-01-001 (February 15, 2001):** The Board of Ethics has stated that a Public Official’s disqualification due to an impermissible conflict of interest, particularly a financial conflict of interest, extends to trying to influence the decision or outcome other than through an official vote. Normally, this means a **direct** attempt to influence the decision, but acting through an agent or proxy would likewise be prohibited, if not more difficult to prove. Thus, a Commission member who recuses himself or herself due to a conflict of interest should not “lobby” other Commissioners or staff on the particular matters at issue. The Board has assumed that for the most part any such “lobbying” effort would take place at the official meeting where the public decision-making (i.e., voting) is taking place and in a direct, one-on-one fashion. Generally, this ban on trying to do indirectly what one is prohibited from doing directly does **not** extend to any incidental expression of opinion or preference (and therefore potential “lobbying”) in other contexts. For example, Public Officials do not forfeit their free or commercial speech rights upon undertaking public service, and Executive Order One does not mandate otherwise. Commission members are generally not prohibited from sharing their opinions, or their employer’s positions, with outside organizations or groups, particularly if that is part of their job. In the end, however, as in so many “ethical” situations, Public Officials and the boards and commissions on which they serve must be extremely sensitive to following not only the letter but also the spirit of the conflict of interest and appearance of conflict rules.

## **Non-Profit Organizations**

AO 97-001 (financing of education program by a nonprofit philanthropic foundation did not cause a conflict)  
AO 97-002 (it would be a conflict for an Official to contract with a national private, non-profit organization)  
AO 98-005 (Official employed by non-profit organization, Research Triangle Institute)  
AO 98-021 (neither Order nor statute prohibits organization [CCA] members from serving on public body)  
AO 99-014 (legal recognition as a nonprofit entity does *not* eliminate relevant conflict of interest issues)  
AO 99-015 (Official is a lifetime member of a non-profit collegiate athletic booster organization)  
AO 99-018 (Public Official employed by private, non-profit that appears before Official’s public body)  
AO 00-007 (employed by a private, tax-exempt, non-profit corporation: Conservation Council of NC)  
AO 02-003 (MEDPAC: Board Member’s solicitation of licensees on behalf of political action committee)

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor

should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules.

**AO-99-014 (July 7, 1999):** The fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of conflict of interest issues for members of the group who serve on State boards and commissions. The same conflict of interest/appearance of conflict guidelines apply.

**AO 97-002 (May 29, 1997):** It would be a conflict of interest for a Public Official to contract with a national private, non-profit organization while serving on such organization's board of directors.

## **Other Organizations, Association/Involvement with**

AO 89-005 (University Chancellor serving as director of bank)  
AO 90-004 (Official on a regulatory board sitting on a the board of a private corporation)  
AO 91-002 (State Treasurer should take care to avoid appearance of conflict while serving on college board)  
AO 97-001 (chairing a national education organization did not cause a conflict of interest)  
AO 97-002 (it would be a conflict for an Official to contract with a national private, non-profit organization)  
AO 98-005 (Official employed by non-profit organization, Research Triangle Institute)  
AO 98-010 (Officials' membership/former membership on local government's advisory board)  
AO 98-021 (Public Officials are members of another organization, the Coastal Conservation Association)  
AO 98-026 (Officials serving on boards of various in-state professional organizations: general principles)  
AO 99-014 (multiple associations/connections with outside organizations; major decision on this topic)  
AO 99-015 (Official is a lifetime member of a non-profit collegiate athletic booster organization)  
AO 99-018 (Public Official employed by private, non-profit that appears before Official's public body)  
AO 00-003 (nonvoting *ex officio* member of other public body did not have conflict/appearance of conflict)  
AO 00-004 (former chair of related trade association had potential, not actual, conflict of interest)  
AO 00-006 (advocacy group of which Official was a board member petitioned public body for rulemaking)  
AO 00-007 (employment by a private, tax-exempt, non-profit corporation: Conservation Council of NC)  
AO 01-001 (Public Official employed by the University of North Carolina System)  
AO 01-003 (public body co-sponsoring continuing education courses with related trade associations)  
AO 02-003 (Medical Board Member's solicitation of licensees on behalf of political action committee)  
AO 03-001 (contract employment with environmental advocacy organization)  
AO 03-002 (Public Official's membership in related trade association)

**AO-03-001 (July 18, 2003):** [NOTE: this opinion modified AO-00-007-B (October 9, 2000) and should be read in conjunction therewith.] A member of the Environmental Management Commission ("EMC" or "the Commission") inquired whether given his recent change from full-time employment with an environmental advocacy organization to that of an independent contractor on a project-by-project basis, with a corresponding change in employment responsibilities, did the standards and restrictions of previous advisory opinions still apply? The Board found that some had changed. Mr. Besse's employment relationship with CCNC changed from that of Conservation Political Director-employee to an independent contractor. He now provides contract services on a project-by-project basis. His initial contract involves writing and editing a weekly bulletin on state legislative and political environmental news. He will not regularly attend or participate in CCNC board meetings. Moreover, his present contract does *not* involve the solicitation of contributions from CCNC members, and Mr. Besse does not anticipate performing that type of service in the future.

In AO-00-007-B, the Board of Ethics established the general parameters for when Mr. Besse should be allowed to participate in (a) contested cases or (b) rulemaking proceedings involving (i) his employer



(CCNC) or (ii) its members, given his financial and/or “personal” relationship with each. This significant opinion was extremely fact-driven. Indeed, the Board determined that despite a significant personal and financial relationship, Mr. Besse should generally be allowed to participate in rulemaking proceedings when either CCNC or its members merely **comment** on proposed rules. Likewise, on the other end of the spectrum, Mr. Besse should not participate in either a contested case involving his contract employer, CCNC, or in a rulemaking proceeding when CCNC is the petitioner.

The most difficult question involves Mr. Besse’s possible participation when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding. In AO-00-007-B, the Board found that Mr. Besse should *not* participate when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding “[b]ecause of the significant relationship, both financial and otherwise, between Mr. Besse, CCNC, and CCNC’s members.” The Board made it clear that it was dealing with “a significant, and perhaps even extreme, financial interest” in the original Besse situation. That situation appears to have changed. Consequently, based on the facts of this case, the Board determined that Mr. Besse should *generally* be allowed to participate in both contested cases and rulemaking proceedings when a *mere* CCNC member is a participant. There are many caveats, however, and Mr. Besse was advised to exercise extreme caution to avoid real or apparent conflicts in particular cases.

**AO-02-003 (May 30, 2002):** The Board has long found that the governors’ ethics orders do *not* prohibit participation in other professional activities. In many cases, it is expected or even required. In the context of trade associations, the Board has stated that membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a potential conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, “the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.” Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles. The Board applied the same principle to involvement with political action committees. If done with extreme sensitivity to the potential for conflict between the public office and private fundraising, soliciting monetary contributions from licensees does not appear to be prohibited by Executive Order Number, but it does create a future situation (appearance of conflict) that would necessitate recusal should any solicited licensee appear before the Public Official.

**AO-01-003 (March 22, 2001):** A public body’s (the North Carolina Board of Mortuary Science) co-sponsoring of legally-required continuing education courses with trade associations whose members are licensed and regulated by the public body could cause an appearance of conflict. The danger lies in the possible perception that because the Board and the trade associations are “partners” in the continuing education programs, association members will enjoy some advantages or benefits that non-members do not. Others may perceive a closer connection between the public regulator and the private organization than there really is. Yet another potential appearance is that the Board is somehow encouraging individuals to join an association. Any one of these perceptions, if reasonable, would undermine public confidence that the Board is acting in the best interest of the public as a whole as required by Executive Order Number One. In addition, voting to share “profits” with a private organization with which a Board member is closely associated could run afoul of section 7 (a) (1) of the Order.

However, board members are NOT barred from any and all involvement with trade associations. Membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a *potential* conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. While the Board of Ethics has stated that the ethics order does not intend to

keep appointees from participating in professional activities, “the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.” Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles.

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members. It sometimes provides public comments on relevant State administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). The Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules. See AO 03-001 (contract employment with environmental advocacy organization)

**AO-00-006 (July 13, 2000):** A member of the Marine Fisheries Commission asked about conflict of interest rules in general and the application of those rules to his particular situation given his membership on the board of directors of an advocacy group that proposed quasi-legislative action (rulemaking) by the public body on which he served. Relying on an earlier opinion, the Board of Ethics found that in quasi-legislative situations such as this, Public Officials “should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding.” A “personal relationship” includes one in a policy-making position in an organization or group. A “participant” includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking. So, as a board member of an advocacy group actively petitioning the Commission to take quasi-legislative action, the member was advised that he should **not** participate in the Commission’s decision regarding such proposed action.

As a general matter, Public Officials are not automatically disqualified from participating in agency/board decisions simply because of their involvement, financial or otherwise, in the industry or area being regulated. In fact, such industry or organization involvement is often legislatively mandated, as it is for the MFC. When statutes require that interested persons be appointed to regulatory or licensing boards, the Board of Ethics generally does not find that such persons have an impermissible conflict of interest due to their personal or financial interest. The Board of Ethics does, however, find that these appointees have the **potential** for conflict of interest and must recuse themselves from discussing or voting on matters before the Board that will specifically impact or affect their business, license, or special interest group with which they are significantly involved. Nor will it affect the board member’s ability to participate in general regulatory decisions that will affect the industry as a whole. The degree of allowable participation, if any, must be determined on a case-by-case basis and varies depending upon the particular function being performed by the public body (e.g., quasi-legislative vs. quasi-judicial).

**AO-00-004 (March 20, 2000):** A licensing/regulatory board asked about conflict/appearance of conflict issues relating to, among other things, a Public Official’s service as chairman of the public body given his prior position as chairman of a related trade organization. The Public Official/chairman resigned his leadership position in the trade association approximately two weeks prior to commencing service on the public body. Drawing support from an earlier opinion (AO-98-010), the Board of Ethics determined that it was not a conflict of interest for the Public Official to serve as chairman of the public body after having served in the same capacity for the related trade organization. However, such Public Officials have the potential for conflict of interest and must recuse themselves from discussing or voting on matters before their public bodies that will specifically impact or affect their business or license (including the licenses of those

they employ or are employed by). This potential for conflict of interest does not usually affect the board member's ability to participate in the licensing of other persons in the industry with whom the member has no financial or personal relationship. Nor will it affect the member's ability to participate in general regulatory decisions which will affect the industry as a whole.

**AO-00-003 (March 21, 2000):** A member of the Board of Transportation ("BOT") asked whether his participation in discussion and voting on specific requests by one transportation-related public body (the Triangle Transit Authority) to another (the BOT) constituted an impermissible conflict of interest or the appearance of a conflict of interest under Executive Order 127. The BOT member was the designated representative of a particular transportation "division." By virtue of that position, he was appointed to an *ex officio* nonvoting position on the Triangle Transit Authority ("TTA") Board of Trustees. The TTA is a "Regional Public Transportation Authority" whose purpose is to finance and operate a public transportation system for the Authority's service area. The TTA consists of 13 members: 10 voting and three nonvoting *ex officio* members appointed by the Secretary of Transportation. The TTA can and does apply for and receive funding from the DOT. After noting its jurisdictional limitations, the Board of Ethics found that while the appointee can and should recuse himself if he determined that his "personal relationship" with the TTA would compromise his ability to protect the overall public interest and fulfill his duties as a member of the BOT, the Executive Order does not require that persons serving as nonvoting *ex officio* members of legislatively-mandated regional transportation authorities recuse themselves when matters involving those authorities come before the BOT for consideration.

**AO-99-014 (July 7, 1999):** Most Coastal Resources Commission members are required to have certain backgrounds or fields of expertise, including one member "who at the time of appointment [is] actively associated with a State or national conservation organization." Two CRC members were members of conservation and/or environmental advocacy groups that appear regularly before the CRC. The "personal interests" that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite "personal relationship." A "participant" in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking.

The Board concluded that CRC members may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the petitioner for a rule. The fact that the member's advocacy group has merely commented on a rule does not, in and of itself, disqualify the member from participation. In **quasi-judicial proceedings**, legal impartiality is required, and the member must avoid both conflict of interest and bias. Consequently, members in policy-making positions (like board members) of advocacy groups may not participate in contested cases involving their advocacy group or where their impartiality might reasonably be questioned as a result of their association with such group.

The fact that a CRC member occupies the seat required to be filled by someone actively associated with a State or national conservation organization does not make a difference in either quasi-judicial or quasi-legislative situations. Moreover, the fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of

conflict of interest issues for members of the group who serve on State boards and commissions. The same guidelines discussed above would apply.

**AO-98-010 (June 29, 1998):** *Active members* of a local government's board or commission which was applying for a grant from the Official's public body (the Parks and Recreation Authority) should recuse themselves from voting on the grant application from the local government they serve. *Elected officials* of local governments applying for grants would have an actual conflict of interest and cannot participate in discussion or voting on that grant application. *Former members* of a local government's board or commission applying for a grant should disclose their past relationship with the grant applicant and discuss with fellow members any concerns of bias toward favoring that applicant over others. In cases of doubt, the presiding officer determines the extent to which, if any, the Official will be allowed to participate, according to the Order.

## **Other Public Organizations or Boards, Membership in/Involvement with**

AO 98-010 (Officials' membership/former membership on *local government's* advisory board)

AO 00-003 (nonvoting *ex officio* member of other public body did not have conflict/appearance of conflict)

AO 01-001 (Public Official employed by the *University* of North Carolina System)

AO 03-002 (in passing re Public Official's membership in related trade association)

**AO-00-003 (March 21, 2000):** A member of the Board of Transportation ("BOT") asked whether his participation in discussion and voting on specific requests by one transportation-related public body (the Triangle Transit Authority) to another (the BOT) constituted an impermissible conflict of interest or the appearance of a conflict of interest under the Governor's executive order on ethics. The BOT member was the designated representative of a particular transportation "division." By virtue of that position, he was appointed to an *ex officio* nonvoting position on the Triangle Transit Authority ("TTA") Board of Trustees. The TTA is a "Regional Public Transportation Authority" whose purpose is to finance and operate a public transportation system for the Authority's service area. The TTA consists of 13 members: 10 voting and three nonvoting *ex officio* members appointed by the Secretary of Transportation. The TTA can and does apply for and receive funding from the DOT. After noting its jurisdictional limitations, the Board of Ethics found that while the appointee can and should recuse himself if he determined that his "personal relationship" with the TTA would compromise his ability to protect the overall public interest and fulfill his duties as a member of the BOT, the Executive Order does not require that persons serving as nonvoting *ex officio* members of legislatively-mandated regional transportation authorities recuse themselves when matters involving those authorities come before the BOT for consideration. An important factor was that the two potentially conflicting boards were both public bodies charged with the same overall mandate of serving the public, not personal or private, interest.

**AO-98-010 (June 29, 1998):** *Active members* of a local government's board or commission applying for a grant from the Official's public body (the Parks and Recreation Authority) should recuse themselves from voting on the grant application from the local government they serve. *Elected officials* of local governments applying for grants would have an actual conflict of interest and cannot participate in discussion or voting on that grant application. *Former members* of a local government's board or commission applying for a grant should disclose their past relationship with the grant applicant and discuss with fellow members any concerns of bias toward favoring that applicant over others. In cases of doubt, the presiding officer determines the extent to which, if any, the Official will be allowed to participate, according to the Order.

## **“Personal Interests”**

AO 93-002 (“personal interest” includes employees or former employees, or detriment to a competitor)  
AO 98-007 (lawyer’s law partners may perform work for Official’s public body [DOT])  
AO 98-010 (current/former member of local government advisory board; elected local government official)  
AO 98-014 (former mayor of city involved in proceeding before Official’s public body)  
AO 99-014 (appearance-causing “personal interests” are broader than strictly financial or familial interests)  
AO 99-015 (any “personal interest” resulting from membership in the Wolfpack Club was not a conflict)  
AO 00-003 (a “personal relationship” includes one in a policy-making position in an organization or group)  
AO 00-008 (“personal interests” include a former association with a participant in a covered proceeding)  
AO 01-003 (appearance-causing “personal interests” are broader than strictly financial or familial interests)  
AO 02-002 (member/school owner’s involvement in disciplinary action involving former student)  
AO 03-002 (Public Official’s membership in related trade association)  
AO 04-001 (“personal financial interest” includes role as a paid consultant for petitioner before public body)

**AO-00-008 (September 11, 2000):** The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. This could include, under appropriate circumstances, a **former** association or relationship with a participant in a covered proceeding. Determining factors would include the nature of the former association or relationship, the length of time separating it from the current public position or function, and the type of proceeding being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative). The Public Official/former mayor of a municipality involved in a contested case proceeding before the Official’s public body (EMC) inquired whether he had an impermissible conflict of interest or appearance of conflict due to his prior association with the municipal party. The Official had been the mayor for 10 years, but had not represented or been officially connected with the municipality for nearly 19 years. The City is now a party to a contested case pending before the EMC. In this case, the extreme gap of time was sufficient to eliminate a reasonable perception of impermissible bias. [See also AO-98-014 involving the same Public Official/body, but re rulemaking.]

**AO-00-003 (March 21, 2000):** The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. In certain situations, the appearance of conflict is so great that Public Officials cannot participate in the decision-making process. This occurs when the Official’s impartiality might reasonably be questioned due to a “familial, personal, or financial relationship with a participant in the proceeding” (emphasis added). A “*personal*” relationship includes one in a policy-making position in an organization or group. This would include membership in the governing body, such as officers and directors.

**AO-99-014 (July 7, 1999):** The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite “personal relationship.” A “participant” in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking. In all situations, a “personal interest” includes close family or business (both profit and nonprofit) associations.

**AO-93-002 (August 27, 1993):** Officials should not participate in a licensing decision if they have a “personal interest in the outcome” or a “reasonably foreseeable benefit from the outcome.” “Personal interest” and “reasonably foreseeable benefit from” include the Official’s employees or former employees or a detriment to a business competitor or potential business competitor.

## **Political Activities**

AO 99-017 (advocacy on behalf of related federal legislation was not a conflict/appearance of conflict)  
AO 00-007 (Official could participate in rulemaking where his employer has lobbied the General Assembly)  
AO 02-003 (Medical Board Member's solicitation of licensees on behalf of political action committee)

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer has an active legislative lobbying program. Among other things, the employee/Official evaluates candidates for statewide legislative office, oversees the candidate endorsement process, publicizes the organization's endorsements, and oversees the provision of assistance to endorsed candidates. The Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules. As a general matter, the Official could participate in rulemaking proceedings where his employer has lobbied the General Assembly (question 8, page 6).

**AO-99-017 (September 20, 1999):** The Public Official's "political advocacy" on behalf of federal legislation which was related to the same industry regulated by her public body (NC Board of Dietetics and Nutrition) did not constitute an actual conflict of interest or create the appearance of a conflict of interest. The Official was very active in the political effort to pass federal legislation which would include dietitians and nutritionists in Medicare reimbursement. She pursued this effort primarily through the American Dietetic Association, Inc. ("ADA"). The ADA has been successful in having legislation introduced in the last three sessions of the United States Congress. Neither the ADA nor the Official has taken a position on related legislation in the North Carolina General Assembly or rulemaking by the D/N Board. Nor has the Board taken a position on the matter. At the present time, this was strictly a federal issue.

## **Post-State Service Employment ("Revolving Door" Situations)**

AO 81-002 (ethics Order does not apply to *former* state employees; general discussion/guidance)

**AO-81-002: (February 19, 1981):** A state employee planned to leave state government to work in a private firm which might later do business with the employee's former state employer. The Board concluded that to the extent that any future business transaction between the employee and the former state employer would lead to an appearance that the employee had a conflict of interest during state service, such transaction could reflect unfavorably on both the former employee and the state agency involved. The Board stated that it had no jurisdiction to oversee the employee after that individual obtained a position in the private sector.

## **Professional Organizations/Trade Associations**

AO 98-019 (reception and dinner given by a major business and industry organization)  
AO 98-026 (Officials serving on boards of various in-state professional organizations: general principles)  
AO 00-001 (convention social event or "hospitality room" sponsored by major trade association)  
AO 00-004 (former chair of related trade association had potential, not actual, conflict of interest)  
AO 01-003 (trade associations: general principles; potential conflict; co-sponsoring continuing ed. courses)  
AO 02-003 (Board Member's solicitation of licensees on behalf of political action committee; general rules)  
AO 03-002 (\*major opinion in context of Public Official's membership in related trade association)

**AO-03-002 (January 8, 2004):** A Public Official inquired about the permissible degree of involvement between covered Officials and related trade associations. Regarding *disclosure* of trade association membership on Statement of Economic Interest (“SEI”) forms, the Board concluded that members should reveal their trade association membership in this situation, particularly if they were “honorary” members in the organization. A close association with an organization or group raises conflict and appearance of conflict issues which must be examined on a case-by-case basis. However, because of the ambiguity of the SEI form in this context and statements about “mere membership” in earlier advisory opinions, the Board did not feel that a member’s failure to disclose NCAPI membership on earlier SEI forms was an “ethical violation.”

The Board reiterated that it is *not* an impermissible conflict of interest for a Public Official to merely *serve* on a non-public body as well as a covered public board; the governors’ ethics orders do *not* prohibit participation in other professional activities. In many cases, it is expected or even required. Membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a potential conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, “the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.” Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles.

Furthermore, the Board reiterated that there are different conflict of interest/disqualification standards in different situations. A higher standard of disqualification is applied in quasi-judicial proceedings (like individual licensing decisions or disciplinary actions) than quasi-legislative matters (like most rulemaking). Unless there is some personal or other connection between the Public Official and another trade association member, the Public Official may generally participate in both contested cases (quasi-judicial decisions) and rulemaking (quasi-legislative) proceedings involving a fellow association member. The Public Official should *not* participate in matters involving association members with whom he/she has had personal involvement, worked on a specific project, or has a significant personal or professional relationship. Nor should a Public Official be involved in any matter where he/she has a specific, unique, and substantial interest in the outcome. If the trade association itself is a party to a proceeding before the public body, the relevant inquiry is the Public Official’s connection to or degree of association with *the association*. If a “mere” member, the Public Official does not have a “personal relationship” with the association and may generally participate in both quasi-legislative and quasi-judicial proceedings. If serving in a leadership or policy-making position in the trade association (for example as an officer or director), the Public Official should not participate in either a contested case (quasi-judicial proceeding) involving the association or a rulemaking proceeding (quasi-legislative proceeding) where the association is the petitioner. He or she may generally participate in rulemaking proceedings where either the association or a member merely comments on a proposed rule.

The Board concluded that it is not *per se* improper for a Public Official to be an active, associate, or honorary member of a trade association. Nor would membership on an association’s governing body be prohibited. The degree of association or involvement with the association would directly impact the degree to which the member could be involved in proceedings involving the association and its members. “Mere” membership would not normally constitute the type of “personal relationship” contemplated by section 7 (b) (2) of the Order; a leadership or policy-making position would. An “honorary” membership was deemed to fall somewhere in the middle and would need to be addressed on a case-by-case basis.

**AO-01-003 (March 22, 2001):** A public body’s (the North Carolina Board of Mortuary Science) co-sponsoring of legally-required continuing education courses with trade associations whose members are

licensed and regulated by the public body could cause an appearance of conflict. The danger lies in the possible perception that because the Board and the trade associations are “partners” in the continuing education programs, association members will enjoy some advantages or benefits that non-members do not. Others may perceive a closer connection between the public regulator and the private organization than there really is. Yet another potential appearance is that the Board is somehow encouraging individuals to join an association. Any one of these perceptions, if reasonable, would undermine public confidence that the Board is acting in the best interest of the public as a whole as required by Executive Order Number One. In addition, voting to share “profits” with a private organization with which a Board member is closely associated could run afoul of section 7 (a) (1) of the Order.

However, board members are NOT barred from any and all involvement with trade associations. Membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a *potential* conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, “the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.” Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles.

**AO-00-004 (March 20, 2000):** A licensing/regulatory board asked about conflict/appearance of conflict issues relating to, among other things, a Public Official’s service as chairman of the public body given his prior position as chairman of a related trade organization. The Public Official/chairman resigned his leadership position in the trade association approximately two weeks prior to commencing service on the public body. Drawing support from an earlier opinion (AO-98-010), the Board of Ethics determined that it was not a conflict of interest for the Public Official to serve as chairman of the public body after having served in the same capacity for the related trade organization. However, such Public Officials have the potential for conflict of interest and must recuse themselves from discussing or voting on matters before their public bodies that will specifically impact or affect their business of license (including the licenses of those they employ or are employed by). This potential for conflict of interest does not usually affect the board member’s ability to participate in the licensing of other persons in the industry with whom the member has no financial or personal relationship. Nor will it affect the member’s ability to participate in general regulatory decisions which will affect the industry as a whole.

**AO-98-019 (June 24, 1999):** Attending a reception and dinner given by a major business and industry organization whose members regularly participate in proceedings before the public body (the Environmental Management Commission) could create an appearance of conflict of interest.

## **Quasi-Judicial/Quasi-Legislative Proceedings**

AO 99-014 (extensive discussion; seminal decision)

AO 00-004 (public body is acting in a quasi-judicial capacity when granting or denying licenses)

AO 00-006 (Official’s advocacy group was petitioner in rulemaking proceeding before public body)

AO 00-007 (general principles/rules in context of employer-employee context; members of employer)

AO 00-008 (making a final decision in a contested-case proceeding is a quasi-judicial decision)

AO 01-001 (higher degree of impartiality is required in quasi-judicial type decisions, involving “legal bias”)

AO 01-004 (grant award is a quasi-judicial-type decision)

AO 02-001 (Real Estate Commission – generalized “bias” ok in quasi-legislative decision-making)

AO 02-002 (member/school owner’s involvement in disciplinary action involving former student)

AO 03-002 (general discussion in context of Public Official’s membership in related trade association)

AO 04-001 (hybrid proceeding)



**AO-00-008 (September 11, 2000):** The Public Official/former mayor of a municipality involved in a contested case proceeding before the Official's public body (EMC) inquired whether he had an impermissible conflict of interest or appearance of conflict due to his prior association with the municipal party. Because the proposed action here is quasi-judicial in nature (making a final decision in a contested case), legal impartiality is required, and the member must avoid both conflicts of interest and bias. What constitutes **legal bias** is a question of law for the Commission and its counsel. However, as pointed out in the CRC opinion, North Carolina courts have found that legal bias may include (1) preconceptions about facts, policy, law, a person, a group, or an object, (2) a personal interest in the outcome of some determination, (3) a fixed opinion that is not susceptible to change, (4) an undisclosed ex parte communication, or (5) a close familial or business relationship with an applicant. [See also AO-98-014 involving the same Public Official/body, but in the context of quasi-legislative rulemaking.]

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members. It sometimes provides public comments on relevant State administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). The Board of Ethics ruled that the Official should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules.

**AO-00-006 (July 13, 2000):** A member of the Commission asked about conflict of interest rules in general and the application of those rules to his particular situation given his membership on the board of directors of an advocacy group that proposed quasi-legislative action (presumably in the form of rulemaking) by the public body on which he served. The Commission member is also on the board of directors of an advocacy group. In quasi-legislative situations such as this, Public Officials "should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding." A "personal relationship" includes one in a policy-making position in an organization or group. A "participant" includes an organization or group, which has *petitioned for rulemaking* or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking. So, under the ethics Order, as a board member of an advocacy group actively petitioning the Commission to take quasi-legislative action, the member was advised that he should **not** participate in the Commission's decision regarding the proposed "management plan."

**AO-99-014 (July 7, 1999): \*Major Board decision on the subject.** The Board concluded that Public Officials (CRC members) may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the petitioner for a rule. The fact that the member's advocacy group has merely commented on a rule does not, in and of itself, disqualify the member from participation. In **quasi-judicial proceedings**, legal impartiality is required, and the member must avoid both conflict of interest and bias. Consequently, members in policy-making positions (like board members) of advocacy groups may not participate in contested cases involving their advocacy group or where their impartiality might reasonably be questioned as a result of their association with such group.

## **Recusal**

AO 83-004 (abstaining may not be enough)  
AO 89-004 (Official should abstain from discussion or voting on matters involving his employer)  
AO 90-001 (no discussion or voting on situations that would only benefit local vs. statewide interest)  
AO 90-003 (no discussion or voting on matters in which Officials have a personal pecuniary interest)  
AO 91-001 (no involvement if Official has a pecuniary interest in/can benefit from matter being considered)  
AO 92-002 (no discussion or voting on matters effecting private interests)  
AO 93-002 (industry members should not participate in, vote on, or attempt to influence licensing decision)  
AO 98-010 (active member of local advisory board should neither vote nor discuss grant request)  
AO 99-007 (discuss but not vote)  
AO 99-008 (discuss but not lobby or vote)  
AO 99-018 (no discussion or voting when Official's employer appears before Official's public body)  
AO 00-002 (Governor's Crime Commission's internal policy; discuss but not lobby or vote)  
AO 01-001 (disqualification due to a conflict extends to otherwise trying to influence the decision)  
AO 01-004 (recusal from process includes discussion and "lobbying")  
AO 04-001 (scope of recusal in rulemaking & on ad hoc advisory sub-committees)  
AO 05-002 (recusal would not cure actual conflict situation re employer and employee on same board)

**AO-05-002 (June 13, 2005):** A member of the Hearing Aid Dealers & Fitters Board ("HADF" or "the Board") disclosed in her annual Statement of Economic Interest ("SEI" or "Statement") filed with the Board of Ethics ("BOE") that she occasionally does occasional, secondary work for a fellow Board member. Having an employer and employee serve on the same public body would create an actual conflict of interest. Moreover, this type of conflict cannot be cured by having the Public Official remove himself or herself from the decision-making process (recusal) because it would effectively eliminate a seat on the public body and thus alter its legislatively-established makeup. The source of the actual conflict must be removed.

**AO-04-001B (June 22, 2004):** The Chairman of the Commission for Health Services ("CHS" or "the Commission") requested an advisory opinion on various conflict of interest/appearance of conflict questions related to a Commission member's private consulting work for a company petitioning the Commission for approval of its wastewater system. The member in question should totally and absolutely recuse himself from the decision-making process, wherever that might take place. When it comes to the ultimate decision-making at the full Commission meeting, the member obviously should not vote or otherwise take any action on his client's petition. Moreover, he should not discuss it with or answer questions from other Commission members or staff. Finally, he should not openly advise his employer's attorneys, technical experts, or other representatives at the Commission meeting. The Board's directives are also clear when it comes to trying to do indirectly what one is prohibited from doing directly (sometimes referred to as "lobbying" in the Board's opinions). Thus the Commission member could not attempt to influence fellow Officials or staff to vote or act a certain way when he himself was prevented from participating due to a conflict or appearance of conflict. This prohibition is not limited to a particular location (e.g., the meeting room) and would include trying to influence a decision through someone else (like an agent or proxy). After noting the unique factual and procedural posture of this case, the Board stated that the member in question should not participate in, influence, or attempt to influence the efforts of the Commission's ad hoc sub-committee dealing with his client's petition. This would include lobbying fellow Commission/sub-committee members or staff, or openly advising his employer's attorneys, technical experts, or other representatives at sub-committee meetings. However, the Board did not find that the member was prohibited from merely attending such sub-committee meetings. The Board also offered prospective guidance relative to the scope of recusal in rulemaking. Because of the unique, almost hybrid nature of the current proceeding before the Commission as well as its unusual procedural history, and because the Commission member here has a specific, substantial, and readily identifiable financial interest in all matters directly relating to the petition, the Board felt that he

should not participate in any related rulemaking proceedings. This would include any rulemaking petitions by his client's competitors and general rulemaking related to innovative and accepted wastewater systems that could affect the financial interests of the member's client or the client's competitors.

**AO-01-001 (February 15, 2001):** In the context of Executive Order One and prior versions of the same, the Board of Ethics has stated that a Public Official's disqualification due to an impermissible conflict of interest, particularly a financial conflict of interest, extends to trying to influence the decision or outcome other than through an official vote. Normally, this means a **direct** attempt to influence the decision, but acting through an agent or proxy would likewise be prohibited, if not more difficult to prove. Thus, a Commission member who recuses himself or herself due to a conflict of interest should not "lobby" other Commissioners or staff on the particular matters at issue. The Board has assumed that for the most part any such "lobbying" effort would take place at the official meeting where the public decision-making (*i.e.*, voting) is taking place and in a direct, one-on-one fashion. Generally, this ban on trying to do indirectly what one is prohibited from doing directly does **not** extend to any incidental expression of opinion or preference (and therefore potential "lobbying") in other contexts. For example, Public Officials do not forfeit their free or commercial speech rights upon undertaking public service, and Executive Order One does not mandate otherwise. Commission members are generally not prohibited from sharing their opinions, or their employer's positions, with outside organizations or groups, particularly if that is part of their job. In the end, however, as in so many "ethical" situations, Public Officials and the boards and commissions on which they serve must be extremely sensitive to following not only the letter but also the spirit of the conflict of interest and appearance of conflict rules.

## **Rules & Rulemaking**

AO 90-003 (involvement of industry appointees)

AO 99-014 (major decision on Public Officials' involvement in quasi-legislative rulemaking)

AO 00-007 (general principles/rules in context of employer-employee context; members of employer)

AO 03-001 (contract employment with environmental advocacy organization)

AO 03-002 (general discussion in context of Public Official's membership in related trade association)

AO 04-001 (scope of recusal in related rulemaking; Official had a unique, substantial, material interest)

AO 04-002 (lawsuit challenging denial of rules, without more, did not raise conflict of interest issues)

**AO-04-001B (June 22, 2004):** The Chairman of the Commission for Health Services ("CHS" or "the Commission") requested an advisory opinion on various conflict of interest/appearance of conflict questions related to a Commission member's private consulting work for a company petitioning the Commission for approval of its wastewater system. Because of the unique, almost hybrid nature of the current proceeding before the Commission as well as its unusual procedural history, and because the Commission member here has a specific, substantial, and readily identifiable financial interest in all matters directly relating to the petition, the Board felt that he should not participate in any related rulemaking proceedings. This would include any rulemaking petitions by his client's competitors and general rulemaking related to innovative and accepted wastewater systems that could affect the financial interests of the member's client or the client's competitors.

**AO-00-007-B (October 9, 2000):** Public Official/Environmental Management Commissioner was employed as the political director for a private, tax-exempt, non-profit corporation organized to provide education and advocacy on environmental issues. The employer is a membership organization, with both individual and organizational members. It sometimes provides public comments on relevant State administrative rulemaking matters and intervenes as a third party in contested cases before State administrative agencies, including the one on which the Public Official serves (the EMC). The Board of Ethics ruled that the Official

should generally not participate in **contested cases** involving either his employer (the advocacy organization) or its members. Nor should the Official participate in rulemaking when either his employer or its members is the **petitioner** for specific rulemaking. The Official was allowed to participate in quasi-legislative rulemaking when either his employer or its members merely **commented** on proposed rules. As a general matter, the Official could participate in rulemaking proceedings where his employer has lobbied the General Assembly (question 8, page 6). See AO 03-001 (contract employment with environmental advocacy organization)

**AO-99-014 (July 7, 1999):** Appointees to State boards and commissions are often selected to “represent” the perspective of different, even opposing, interests. Thus, the potential for “bias” in the sense of a general preference or inclination is intentionally built into the organizational structure. Traditionally, this is an acceptable part of the legislative/quasi-legislative process, like most rulemaking. Courts will generally not concern themselves with the underlying motives or rationale for legislative/quasi-legislative decisions, particularly if such motivations are non-financial. Partisan interests are superseded, however, by basic considerations of fairness and due process in judicial/quasi-judicial situations, such as contested cases, where an unbiased, impartial decision-maker is deemed essential. Most Coastal Resources Commission members are required to have certain backgrounds or fields of expertise, including one member “who at the time of appointment [is] actively associated with a State or national conservation organization.” Two CRC members were members of conservation and/or environmental advocacy groups that appear regularly before the CRC.

The Board noted that an appearance of conflict exists when a reasonable person would conclude from the circumstances that the Public Official’s ability to protect the public interest, or perform public duties, is compromised by personal interests. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite “personal relationship.” A “participant” in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking.

The Board concluded that CRC members may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the petitioner for a rule. The fact that the member's advocacy group has merely commented on a rule does not, in and of itself, disqualify the member from participation. [See also AO-00-007, Besse opinion.]

## **Time removed from potential conflict situation**

AO 98-014 (17 years since past service as mayor of city involved in rulemaking before public body)  
AO 00-004 (Public Official/current chair was very recently the chairman of a related trade organization)  
AO 00-008 (19 years since past service as mayor of city involved in contested case before public body)  
AO 02-002 (member/school owner’s involvement in disciplinary action involving former student)  
AO 03-001 (“cooling off” period after special employment with environmental advocacy organization)

**AO-03-001 (July 18, 2003):** [NOTE: this opinion modified AO-00-007-B (October 9, 2000) and should be read in conjunction therewith.] A member of the Environmental Management Commission (“EMC” or “the Commission”) inquired whether given his recent change from full-time employment with an environmental advocacy organization to that of an independent contractor on a project-by-project basis, with a corresponding change in employment responsibilities, did the standards and restrictions of previous advisory opinions still apply? The Board found that some had changed. Mr. Besse’s employment relationship with CCNC changed from that of Conservation Political Director-employee to an independent contractor. While the Board felt that Mr. Besse should *generally* be allowed to participate in both contested cases and rulemaking proceedings when a *mere* CCNC member is a participant, it also stated that he should observe a general “cooling off” period for a reasonable length of time, depending on the nature of the proceeding (contested case vs. rulemaking), the particular member involved, and other relevant factors. This would be determined on a case-by-case basis with an eye toward avoiding even the appearance of a conflict of interest. Executive Order One (“EO One” or “the Order”), section 7 (b).

**AO-00-008 (September 11, 2000):** The Public Official/former mayor of a municipality involved in a contested case proceeding before the Official’s public body (EMC) inquired whether he had an impermissible conflict of interest or appearance of conflict due to his prior association with the municipal party. The Official had been the mayor for 10 years, but had not represented or been officially connected with the municipality for nearly 19 years. The City is now a party to a contested case pending before the EMC. While the “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and can include, under appropriate circumstances, a **former** association or relationship with a participant in a covered proceeding, the Board determined that in this case the extreme gap of time (19 years) was sufficient to eliminate a reasonable perception of impermissible bias. [See also AO-98-014 involving the same Public Official/body, but re rulemaking.]

**AO-00-004 (March 20, 2000):** A licensing/regulatory board asked about conflict/appearance of conflict issues relating to, among other things, a Public Official’s service as chairman of the public body given his prior position as chairman of a related trade organization. The Public Official/chairman resigned his leadership position in the trade association approximately two weeks prior to commencing service on the public body. Drawing support from an earlier opinion (AO-98-010), the Board of Ethics determined that it was not a conflict of interest for the Public Official to serve as chairman of the public body after having served in the same capacity for the related trade organization.

**AO-98-014 (July 31, 1998):** The Public Official/former mayor of a municipality involved in rulemaking asked whether he had a disqualifying conflict of interest due to his prior association with the municipal party. The Official had not held a public office in the municipality for 17 years and currently held no official position with any other governmental agency in the region. The public body (EMC), and thus the Official, is now being asked to choose between two sets of land use controls, one of which will impose greater duties on local governments, like the Official’s former employer. The Board found that the passage of 17 years removed the potential for a conflict of interest based on the prior local government service. The Official was advised to disclose his prior position with the municipal participant and consider whether he was biased in its favor. [See also AO-00-008, involving the same Public Official in a contested case.]

## **End of TOPICAL INDEX OF ADVISORY OPINIONS**